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N. 3020

No. 15369

United States
Court of Appeals
for the Ninth Circuit

UTILITY APPLIANCE CORPORATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-15-57

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

GEORGE T. ALTMAN,
233 So. Beverly Drive,
Beverly Hills, Calif.,

For the Petitioner.

CHARLES K. RICE,
Asst. U. S. Attorney General;

LEE A. JACKSON,
Attorney, Dept. of Justice,
Department of Justice,
Washington 25, D. C.,

For the Respondent.

The Tax Court of the United States

Docket No. 45914

UTILITY APPLIANCE CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1952

Dec. 12—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 22—Copy of petition served on General Counsel with exhibits attached.

1953

Feb. 17—Answer filed by General Counsel.

Feb. 17—Request for hearing in Los Angeles filed by General Counsel.

Feb. 19—Notice issued placing proceeding on Los Angeles Calendar. Service of answer and request made.

1954

Jan. 21—Motion to amend petition embodying amendment filed by taxpayer. 1/22/54, granted.

Jan. 25—Copy of motion to amend petition served on General Counsel.

Mar. 24—Answer to amendment to petition filed by General Counsel. 3/25/54, copy served.

Aug. 10—Hearing set December 6, 1954, Los Angeles, Calif.

Oct. 26—Notice cancelling hearing.

1955

Sept. 6—Joint motion to submit proceeding under Rule 30 filed.

Sept. 6—Stipulation of Facts filed.

Sept. 9—Order that proceeding be assigned to Judge Kern, Div. 16, for disposition, Petitioner's brief, 10/15/55; respondent's brief, 12/15/55; petitioner's reply brief, 1/15/56, entered.

Oct. 14—Brief filed by taxpayer. Copy served.

Dec. 15—Answer brief filed by respondent. Served 12/16/55.

1956

Jan. 13—Reply brief filed by taxpayer. 1/13/56, copy served.

Apr. 9—Supplementary brief filed by petitioner.

May 31—Opinion filed, Judge Kern, Div. 16. Decision will be entered under Rule 50. Served 6/1/56.

July 13—Agreed computation for entry of decision filed.

July 26—Decision entered, Judge Kern, Div. 16.

Oct. 19—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

Oct. 19—Notice of filing petition for review with proof of service thereon filed by petitioner.

Oct. 19—Designation of Contents of Record on review filed by petitioner.

Oct. 19—Notice of filing designation of contents of record on review with proof of service thereon filed by petitioner.

The Tax Court of the United States

Docket No. 45914

UTILITY APPLIANCE CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, Bureau symbols LA:IT:90D:CTF, dated October 8, 1952, and his partial rejection therein of applications for relief under section 722 of the Internal Revenue Code, and as a basis for this proceeding alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of California with mailing address at 141 South El Camino Drive, Beverly Hills, California. The returns for the periods herein

involved were filed with the Collector for the Sixth District of California.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to the petitioner on October 8, 1952. The dates of filing of the respective applications for relief under section 722 are given in the said notice of deficiency. Copies of said applications for the years 1943 and 1944 are attached hereto and marked Exhibits "B" and "C," respectively. The reason for not attaching copies of the applications for prior years is shown in paragraph 3 below.

3. After submission of data to the Commissioner, a settlement was reached. By virtue of said settlement, the only taxable year open before this Court is 1944, and as to said year the only question open before this Court is whether or not a constructive average base period net income for either or both of the years 1943 and 1945 in the amount agreed upon with the Commissioner, being the amount of $65,000.00 for each year as set forth in Exhibit "A" attached hereto, may be employed for the purpose of computing the unused excess profits credit carryback from 1945 to 1944. If such constructive average base period net income for both of said years is so employed, there would result for 1944 an overassessment of excess profits tax in the amount of $32,454.46, and a deficiency in income tax of $17,699.88, instead of the amounts of $10,729.31 and $7,536.08, respectively, shown in the deficiency notice, Exhibit "A" attached hereto. It results that the

taxes involved in this controversy are excess profits taxes for 1944 in the sum of $21,725.15, subject to offset by additional income taxes for the same year the amount of which, if petitioner is sustained as to the full sum, will be $10,163.80.

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(a) Failure to hold that the applications for relief filed were timely in respect to the computation of an unused excess profits credit adjustment for 1944 on the basis of employment of a constructive average base period net income for the year 1943.

(b) Failure to hold that the applications for relief filed were timely in respect to the computation of an unused excess profits credit adjustment for 1944 on the basis of employment of a constructive average base period net income for the year 1945.

5. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) The revenue agent's report for the years 1942 to 1945, inclusive, rendered under date of June 10, 1947, contains an allowance of an unused excess profits credit adjustment for 1944 consisting of an unused excess profits carry-back from 1945. The pertinent pages of said report, being pages 33 and 34, are attached hereto as Exhibit "D."

(b) The application forms provided by the Treasury Department, Form 991, do not require a

computation of the tax computed after application of Section 722. The amount so computed is required to be entered on page 1, line 7, but nowhere does the form, including the instructions attached thereto, require a showing as to how the amount was computed.

(c) Nowhere on its application for relief under Section 722 filed for 1944 did petitioner show how it computed the amount of excess profits tax after application of Section 722. Petitioner, in accordance with the form, merely entered such amount on page 1, line 7, thereof; and the amount there shown, $131,071.33, is less than the amount now claimed by petitioner in this petition. Likewise, the amount of refund or credit for which said application was a claim, $43,081.70, as shown on page 1, line 15 thereof, is greater than the refund now claimed by petitioner in this petition.

(d) On January 16, 1948, there was assessed for 1944 additional excess profits tax in the amount of $31,658.68, plus interest in the amount of $2,462.58, or a total of $34,121.26. The said total was paid as follows:

October 11, 1948	$ 9,534.36
November 10, 1948	11,054.18
January 25, 1949	7,500.00
February 14, 1949	6,032.72

Additional interest of $1,762.12 was also paid on February 14, 1949.

(e) On September 8, 1950, the Treasury Department issued its Revenue Agent's Report covering the issues raised under section 722, wherein on page 1 it made the following statement:

> "(c) The taxpayer originally paid excess profits tax and filed Form 991 for 1943, but subsequently all the excess profits tax paid was refunded because of a net operating loss and unused excess profits credit carry-back from 1945, so that Form 991 is ineffective. No timely amended Form 991 or Form 843 claim has been filed for other years claiming an unused excess profits credit carry-over or carry-back from 1943 based on a CABPNI, as required by the regulations, so no CABPNI is recommended for 1943 for the purpose of a carry-over or carry-back."

(f) On September 20, 1950, petitioner, by its attorney, George T. Altman, filed with the Excess Profits Tax Council at Washington, D. C., a protest, bearing date of September 13, 1950, to the conclusions reached in the said Revenue Agent's Report. Among other statements contained in said protest is the following on the last page thereof:

> "Taxpayer also contends that reconstruction should be allowed for 1943 for unused excess profits credit carry-back and carry-over purposes."

(g) No reference was made in the said protest to a reconstruction for 1945 only because no such

reconstruction was mentioned in the said Revenue Agent's Report, and not because there was any intention to request a reconstruction for 1943 but not for 1945. On May 7, 1951, petitioner, through its attorney, George T. Altman, filed a letter with the Excess Profits Tax Council, the said letter being verbatim as follows:

> "It appears from the record that the applications filed in this proceeding cover only the years 1940-1944, inclusive. Since there was no tax for 1945, no claim was filed for that year.
>
> "We should like to ask now that a constructive average base period net income be determined for 1945 for such application in respect of taxes for years prior to 1945 as the taxpayer may be entitled to upon the record.
>
> "I believe that such a determination should be made as a matter of course because of the carry-back to 1943 and 1944. See revenue agents' reports respecting standard issues. The carry-back has also been a matter of discussion in conferences with the office of the Internal Revenue Agent in Charge and with the Technical Staff. See letter dated December 3, 1948, from the Internal Revenue Agent in Charge to the taxpayer.
>
> "This request is made, nevertheless, for the purpose of making it an express part of the record."

(h) In the said letter dated December 3, 1948, the Internal Revenue Agent in Charge explained that further information was necessary to sustain the petitioner's claims and in that connection pointed out that the excess profits tax paid for the year 1943 had been refunded, due "to a net operating loss and unused excess profits credit carry-back from 1945."

(i) In all discussions and conferences had by petitioner with the offices of the Commissioner, both before and after March 15, 1949, in regard to its various applications for relief, including that for 1944, carry-over and carry-back factors were always taken into consideration. More specifically, various amounts of constructive average base period net income were discussed as a basis of settlement, and in estimating, in the course of said discussions, the reduction in tax resulting, carry-over and carry-back factors were always given effect.

(j) Long prior to the expiration of the period of limitations under section 322 of the Internal Revenue Code the Commissioner was on actual notice that petitioner's understanding of its application for relief was that carry-over and carry-back provisions would be automatically applied in any year in which any tax reduction would result therefrom.

Wherefore petitioner prays that this Court may hear the proceeding and determine that petitioner is entitled to a carry-back of unused excess profits

credit from the year 1945 to the year 1944, based upon a constructive average base period net income for the years 1943 and 1945.

/s/ GEORGE T. ALTMAN,
Counsel for Petitioner.

EXHIBIT "A"

Oct. 8, 1952.

LA:IT:90D:CTF

Utility Appliance Corp.
(Formerly Utility Fan Corporation)
141 South El Camino Boulevard
Beverly Hills, California

Gentlemen:

You are advised that the determination of your excess profits tax liability for the taxable years ended December 31, 1940, 1941, 1942, 1943 and 1944, discloses an overassessment of $36,736.81, and that the determination of your income tax liability for the taxable years ended December 31, 1941, 1942 and 1944 discloses a deficiency of $17,961.47, as shown in the statement attached.

In making this determination careful consideration has been given to your applications for relief (Forms 991) under section 722 of the Internal Revenue Code filed on September 13, 1943 for the taxable years ended December 31, 1940, 1941 and 1942,

and on May 15, 1945, for the taxable years ended December 31, 1943 and 1944. The relief requested has been allowed in part inasmuch as it has been determined that a constructive average base period net income is allowable in the amount of $39,000.00 for the taxable year ended December 31, 1940, in the amount of $65,000.00 for each of the taxable years ended December 31, 1941, 1942 and 1944, and in the amount of $65,000.00 for each of the taxable years ended December 31, 1943 and 1945, for the purpose of computing unused excess profits credit carry-back and carry-over.

In accordance with the provisions of sections 272 and 732 of the Internal Revenue Code, notice is hereby given of the deficiency mentioned and of the disallowance of the claim for refund asserted in your application for relief (Form 991) for the taxable year ended December 31, 1943, and of the disallowance in part of the claims for refund asserted in your applications for relief (Forms 991) for the taxable years ended December 31, 1940, 1941, 1942 and 1944, and in the related claims for refund (Forms 843) filed on October 26, 1948, for the taxable year ended December 31, 1941, and on February 28, 1949, for the taxable years ended December 31, 1942 and 1944.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States at its principal address, Washington 4, D. C., for a redetermination of your tax liability. In counting the 90 days you may not

exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be computed in computing the 90-day period.

Very truly yours,

JOHN B. DUNLAP,
Commissioner.

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent
in Charge.

CTF:vmc
Enclosures:
Statement
Form 1276

Statement

LA:IT:90D:CTF

Utility Appliance Corp.
(Formerly Utility Fan Corporation)
141 South El Camino Boulevard
Beverly Hills, California

Tax Liability for the Taxable Years Ended
December 31, 1940, 1941, 1942, 1943, and 1944

Excess Profits Tax

Year	Liability	Assessed	Over-assessment	Deficiency
1940	$ 3,324.19	$ 3,897.45	$ 573.26	None
1941	27,060.39	35,538.47	8,478.08	None
1942	33,329.46	50,285.62	16,956.16	None
1943	None	None	None	None
1944	172,577.90	183,307.21	10,729.31	None
Totals	$236,291.94	$273,028.75	$36,736.81	None

Income Tax

Year	Liability	Assessed	Over-assessment	Deficiency
1941	$ 34,156.05	$ 31,527.84	None	$ 2,628.21
1942	26,732.70	18,935.52	None	7,797.18
1944	33,784.94	26,248.86	None	7,536.08
Totals	$ 94,673.69	$ 76,712.22	None	$17,961.47

In making this determination of your tax liability careful consideration has been given to your applications for relief (Form 991) under section 722 of the Internal Revenue Code, as follows:

Year Ended	Filed on
December 31, 1940	September 13, 1943
December 31, 1941	September 13, 1943
December 31, 1942	September 13, 1943
December 31, 1943	May 15, 1945
December 31, 1944	May 15, 1945

and to the following related claims (Form 843):

Year Ended	Filed on
December 31, 1941	October 26, 1948
December 31, 1942	February 28, 1949
December 31, 1944	February 28, 1949

The relief requested has been allowed in part inasmuch as it has been determined that a constructive average base period net income is allowable in the amount of $39,000.00 for the taxable year ended December 31, 1940, and in the amount of $65,000.00 for each of the taxable years ended December 31, 1941, 1942, and 1944. It is noted that you have executed an agreement to such amounts of constructive average base period net income.

Inasmuch as it has been previously determined that no excess profits tax liability exists for the taxable year ended December 31, 1943, your application for relief for that taxable year is rejected.

There has been determined a constructive average base period net income in the amount of $65,000.00 for each of the taxable years ended December 31, 1943, and December 31, 1945, for the purpose only of computing unused excess profits credit carry-

over and carry-back to the extent applicable. However, it is held that no timely claim for refund has been filed for the purpose of using the constructive average base period net income in the computation of the unused excess profits credit carry-over or carry-back from either of such years.

The income tax net income and excess profits net income shown herein are the same amounts as shown by reports of examination dated January 29, 1945, and April 21, 1947, copies of which were sent you, and to which you have indicated your agreement.

A copy of this letter and statement has been mailed to your representative, Mr. George T. Altman, 233 South Beverly Drive, Beverly Hills, California, in accordance with the authorization contained in the power of attorney executed by you.

Duly verified.

Received and Filed December 12, 1952, T.C.U.S.

Served December 22, 1952.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in the first two sentences of paragraph 2 of the petition; denies the remaining allegations contained in said paragraph.

3. Admits that the taxes in controversy are excess profits taxes for 1944, subject to offset by additional income taxes for the same year, in the amounts as alleged in paragraph 3 of the petition; denies the remaining allegations contained in paragraph 3 of the petition.

4(a) and (b). Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a). Admits that respondent allowed an unused excess profits credit adjustment for 1944 consisting of an unused excess profits carry-back from 1945 based upon invested capital; denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) and (c). Denies the allegations contained in subparagraphs (b) and (c) of paragraph 5 of the petition.

(d). Admits the allegations contained in the first sentence of subparagraph (d) of paragraph 5 of the petition; for lack of sufficient information presently available, denies the remaining allegations contained in said subparagraph.

(e) to (j) inclusive. Denies the allegations contained in subparagraphs (e) to (j) inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

7. Further answering and in the alternative, in the event that respondent's determination with respect to the unused excess profits credit carry-back from the taxable year 1945 to the taxable year 1944 should not be sustained there would result an increase in the income subject to normal tax and surtax, and an increased deficiency in income tax for the taxable year 1944 of $10,163.80, i.e., from $7,536.08, as determined in the notice of deficiency, to $17,699.88, as alleged in paragraph 3 of the petition. Claim for this increased deficiency in income tax is hereby made.

Wherefore, it is prayed that the Commissioner's determination be approved; and in the alternative, in the event that said determination is not approved respondent prays that the Court redetermine the deficiency in income tax for the taxable year 1944 to be in the amount determined by the Commissioner, plus an increased deficiency resulting from the redetermination by the Court with respect to income subject to excess profits tax, claim for which increased deficiency is hereby made pursuant to the provisions of Section 272(e) of the Internal Revenue Code.

/s/ CHARLES W. DAVIS, E.C.C.
Chief Counsel,
Bur. of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
District Counsel;

E. C. CROUTER,
Appellate Counsel;

R. B. SULLIVAN,
Special Attorney,
Bur. of Internal Revenue.

Received and filed February 17, 1953, T.C.U.S.

[Title of Tax Court and Cause.]

MOTION TO AMEND PETITION EMBODYING AMENDMENT

Petitioner now moves the Court for leave to amend the petition herein, and to treat the petition as so amended, as follows:

1. To correct the last two sentences of paragraph 3 thereof to read: "If such constructive average base period net income for both of said years is so employed, there would result for 1944 an overassessment of excess profits tax in the amount of $44,674.80, and a deficiency in income tax of $23,417.00, instead of the amounts of $10,729.31 and $7,536.08, respectively, shown in the deficiency notice, Exhibit "A" attached hereto. It results that the taxes involved in this controversy are excess profits taxes for 1944 in the sum of $33,945.49, subject to offset by additional income taxes for the same year the amount of which, if petitioner is sustained as to the full sum, will be $15,880.92."

2. To add the following to paragraph 5:

(k) In arriving at the figure of $10,884.69 which appears on page 5 of the deficiency notice as "Unused excess profits credit adjustment" allowed for the taxable year ended December 31, 1944, the Commissioner determined the excess profits net income for 1943 to be $87,205.79; and in determining the said amount of excess profits net income he increased the excess profits net income otherwise computed by the amount of $14,292.80 as being 50% of the interest deduction for 1945. The said amount of $14,292.80, representing an adjustment of the net operating loss for 1945, resulted from the use of the invested capital method in determining the excess profits credit for 1945.

(l) The letter dated May 7, 1951, referred to in paragraph 5 (g) above was acknowledged in writing by the Commissioner on May 8, 1951, the case then being still under consideration on the merits by the Commissioner. Several conferences and considerable correspondence with the office of the Commissioner relating to the merits of the case occurred after said date and before the Commissioner's final determination. A settlement of the amount of the constructive average base net income for all taxable years was agreed to by the petitioner on July 2, 1952, and the Commissioner's determination of such constructive average base period net income was made on September 19, 1952. Subsequent to the filing of the petition herein petitioner filed an "Amendment of claim" on Form 843 to formalize,

if necessary, the written though informal contentions and claims quoted in paragraphs 5 (f) and 5 (g) above.

Reason for Motion

The purpose of this amendment is to eliminate errors of computation which were made in arriving at the figures shown in paragraph 3 of the petition; to put into the record figures necessary for any recomputation of tax; and to add to the petition certain additional specifications of fact.

/s/ GEORGE T. ALTMAN,
Counsel for Petitioner.

Received and filed January 21, 1954, T.C.U.S.

Granted January 22, 1954, John W. Kern, Judge.

Served January 25, 1954.

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

The Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the amendment to petition of the above-named taxpayer, admits, denies and alleges as follows:

1. Admits that the taxes in controversy are excess profits taxes for 1944, subject to offset by ad-

ditional income taxes for the same year. Denies the remaining allegations in paragraph 1 of the amendment and in paragraph 3 of the petition as amended.

2. Denies the allegations in paragraph 2 of the amendment and each subparagraph thereof, and in subparagraphs (k) and (l) of paragraph 5 of the petition as amended.

3. Denies each and every allegation contained in the amendment to the petition not hereinbefore specifically admitted, qualified or denied.

4. Further answering and in the alternative, in the event that respondent's determination with respect to the unused excess profits credit carry-back from the taxable year 1945 to the taxable year 1944 should not be sustained there would result an increased deficiency in income tax for the taxable year 1944. Claim for this increased deficiency in income tax is hereby made.

Wherefore, it is prayed that the Commissioner's determination be approved; and in the alternative, in the event that said determination is not approved respondent prays that the Court redetermine the deficiency in income tax for the taxable year 1944 to be in the amount determined by the Commissioner, plus an increased deficiency resulting from the redetermination by the Court with respect to income subject to excess profits tax, claim for which increased deficiency is hereby made pursuant to the

provisions of Section 272(e) of the Internal Revenue Code.

/s/ DANIEL A. TAYLOR, R.E.M.
Chief Counsel, Internal
Revenue Service.

Filed March 24, 1954, T.C.U.S.

Served March 25, 1954.

[Title of Tax Court and Cause.]

OPINION

Petitioner filed a claim for relief under section 722 for the year 1944. In that claim no reference was made to any carry-back of unused excess profits credit from 1945. A tentative carry-back of such credit was allowed but was not computed on any constructive average base period net income for 1945. After the time prescribed by section 322 (b) (6) petitioner claimed such carry-back as so computed. Thereafter the parties agreed on the constructive average base period net income of petitioner for 1944 and 1945. Held, petitioner had filed no timely claim for a carry-back to 1944 of unused excess profits credit from 1945 computed on the constructive average base period net income for that year.

GEORGE T. ALTMAN, ESQ.,
For the Petitioner.

R. E. MAIDEN, JR., ESQ.,
For the Respondent.

Opinion

Kern, Judge:

In this case, submitted under Rule 30, it is stipulated that "the sole issue is whether petitioner has a timely claim for an unused excess profits credit arising from the use of a constructive average base period net income for carry-back purposes, so that a constructive average base period net income for the year 1945 may be employed for the purpose of computing the unused excess profits credit carry-back from 1945 to 1944."

Petitioner is a corporation organized under the laws of the State of California. It filed its returns for the periods here involved with the collector for the sixth district of California.

The only year before this Court is 1944. It is stipulated that if the Court holds that the constructive average base period net income for the year 1945 may be employed in the computation of unused excess profits carry-back from 1945 to 1944, the amount of such income is $65,000.

Petitioner had no excess profits net income for the year 1945, but had a deficit in such net income. Its excess profits credit for that year, computed without regard to section 722, was $43,435.34 as computed under section 713, and $55,180.66 as computed under section 714.

In the deficiency notice the Commissioner allowed an unused excess profits credit adjustment for the year 1944 in the amount of $10,884.69. That amount

was computed without regard to section 722, as follows:

Unused excess profits credit for 1945	$55,180.66
Portion thereof first applied to 1943	44,295.97
Balance being unused excess profits credit carry-back to 1944.....	$10,884.69

The foregoing computation appears in a revenue agent's report dated June 10, 1947. The correct amount to be first applied to 1943, as now agreed to by the Commissioner, is $11,162.99 instead of the amount of $44,295.97.

The Commissioner allowed to petitioner under section 722 (b) (4), a constructive average base period net income of $39,000 for the year 1940, and $65,000 for each of the years 1941, 1942 and 1944. The Commissioner has also now agreed to the employment of a like constructive average base period net income, $65,000, for the year 1943. The amount of $11,162.99, stipulated as the amount of excess profits credit carry-back from 1945 to be applied first to the year 1943, is computed as follows:

Excess profits net income, 1943 per return	$ 98,170.66
Adjustments per revenue agent's report:	
Add: Declared value excess-profits tax overassessment..	3,841.03
Total	$102,011.69
Deduct: net income adjustment	29,098.70

Excess profits net income, 1943, as so adjusted		$ 72,912.99
Deduct: 95% of $65,000, constructive average base period net income for 1943		61,750.00
Balance, being amount of unused excess profits credit for 1945 to be applied first to 1943 (whether the total amount of such credit for 1945 is computed with or without the use of a constructive average base period net income)		$ 11,162.99

Petitioner filed its excess profits tax return for the year 1944 on May 15, 1945, pursuant to extension granted by the Commissioner to such date. The following payments of tax were made by petitioner on the dates indicated for excess profits tax liability for the year 1944:

Original:		
Paid 3/15/45	$ 36,649.00	
5/15/45	6,497.03	
6/15/45	43,081.70	
9/17/45	43,081.70	
12/17/45	43,081.70	
Total	$172,391.13	
Less: Interest	64.33	
Tax paid		$172,326.80

Additional:		
Paid 10/11/48	$ 9,534.36	
11/10/48	11,054.18	
1/25/49	7,500.00	
2/14/49	7,794.84	
Total	$ 35,883.38	
Less: Interest $2,462.58		
" 1,762.12	4,224.70	
Tax Paid		31,658.68
Total tax paid		$203,985.48
Less: Allowance on tentative carry-back claim 11/25/46		20,678.27
		$183,307.21

On May 15, 1945, petitioner filed an application on Form 991, for excess profits tax relief for the year 1944. This application asked for a reduction in excess profits tax under section 722 in the amount of $90,153.56, from $221,224.89 to $131,071.33, computed in each case prior to the 10 per cent credit for debt retirement. The application claimed a constructive average base period net income of $161,058.71, computed under section 722 (b) (4). Details in support of the constructive average base period net income as claimed were incorporated in the application by reference from statements attached to Form 991 filed by petitioner for the year 1942. Nothing in the form required a schedule showing how the reduced tax claimed of $131,071.33 was computed, and no such schedule was attached.

The reduced tax claimed of $131,071.33 was computed in conformance with section 710 and 711 of the Internal Revenue Code of 1939, as follows:

Excess profits net income (income credit method)		$300,975.60
Specific Exemption	$ 10,000.00	
Constructive average base period net income claimed on Form 991	161,058.71	
Constructive excess profits credit based on constructive income is 95% of the claimed constructive average base period net income	153,005.77	163,005.77
Adjusted excess profits net income after application of section 722 as claimed		$137,969.83
Excess profits tax at rate of 95%		$131,071.33

The amount of excess profits tax paid by petitioner at or prior to the filing of its claim for relief for 1944 on Form 991, that is, at or prior to May 15, 1945, was $43,081.70, and that amount was shown on Form 991 as the amount of refund or credit for which the application was a claim. Subsequently, on February 28, 1949, petitioner filed a claim on Form 843 to supplement the Form 991 and claimed a total refund of $79,446.59. The claim filed on Form 843 comprehended a constructive average base period net income for 1944 of $161,058.71, without claiming any carry-back of unused excess profits credit from 1945 based on a constructive average base period net income.

Both the application filed by petitioner on Form 991 on May 15, 1945, for the year 1944, and the

claim filed on Form 843 on February 28, 1949, for such year, comprehended a constructive average base period net income for 1944 of $161,058.71, without claiming any carry-back of unused excess profits credit from 1945 computed either with or without regard to section 722.

No agreement was entered into by the petitioner and the respondent which would extend the statute of limitation for the year 1944 or 1945.

On December 3, 1948, the internal revenue agent in charge at Los Angeles wrote to petitioner inter alia, as follows:

> Reference is made to your claims for excess profits tax relief under section 722 of the Internal Revenue Code, filed for the years ended December 31, 1940, 1941, 1942, 1943 and 1944.
>
> In connection with these claims, it may be noted that the general average base period net income is $29,836.74, whereas under the growth formula, provided in section 713 (f) of the Code, you are entitled to use $45,168.23, excess profits net income for the year 1939 which is the highest income in base period years. Also, that excess profits tax paid for the year 1943 was refunded, due to a net operating loss and unused excess profits credit carry-back from 1945, and that in 1944 the 80% tax limitation is applicable.
>
> The claims for relief have been carefully reviewed on the basis of information submitted

> in connection with the claims, and there appears to be no possibility of a constructive average base period net income which would overcome the growth formula and the 80% limitation, in 1944, and result in the allowance of any relief.

As stated in this letter of December 3, 1948, an unused excess profits credit carry-back from 1945 to 1944 had already been allowed by the Commissioner, on the basis of issues other than section 722.

On May 7, 1951, petitioner, by its attorney, mailed a letter to the Excess Profits Tax Council, as follows:

> It appears from the record that the applications filed in this proceeding cover only the years 1940-1944, inclusive. Since there was no tax for 1945 no claim was filed for that year.
>
> We should like to ask now that a constructive average base period net income be determined for 1945 for such application in respect of taxes for years prior to 1945 as the taxpayer may be entitled to upon the record.
>
> I believe that such a determination should be made as a matter of course because of the carry-back to 1943 and 1944. See revenue agent's reports respecting standard issues. The carry-back has also been a matter of discussion in conferences with the office of the Internal Revenue Agent in Charge and with the

> Technical Staff. See letter dated December 3, 1948, from the Internal Revenue Agent in Charge to the taxpayer.
>
> This request is made, nevertheless, for the purpose of making it an express part of the record.

On May 8, 1951, the Excess Profits Tax Council acknowledged receipt of this letter and replied to it as follows:

> Receipt is acknowledged of your letter of May 7, 1951, concerning subject applications for section 722 relief. It is noted that this letter requests a determination of constructive average base period net income for 1945.

On the date of this letter, May 7, 1951, the applications for relief involved in this proceeding were pending on the merits before the said Excess Profits Tax Council. Several conferences and considerable correspondence with the office of the Commissioner relating to the merits of the case occurred after such date and before the Commissioner's final determination. A settlement of the amount of the constructive average base period net income for all taxable years, including 1945, was agreed to by the petitioner on July 2, 1952, and the Commissioner's determination of this constructive average base period net income was made on September 19, 1952.

On January 20, 1954, petitioner filed on Form 843 an "Amendment of Claim" relating to its claim for refund of excess profits tax for the year 1944

"solely for the purpose of making formal the claims previously presented requesting use in computing the unused excess profits credit adjustment for 1944, of a constructive average base period net income determined under section 722 for 1943 and 1945.* * *"

Provisions of the statute and regulations pertinent to the problem presented by this case are set out in the margin.[1]

It is obvious from the facts stipulated that the letter of petitioner's counsel dated May 7, 1951, if considered alone as an application equivalent to

---

[1]Sec. 322. Refunds and Credits.

* * *

(b) Limitation on Allowance.

(1) Period of Limitation—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later.* * *

(6) Special Period of Limitation with Respect to Net Operating Loss Carry-backs and Unused excess Profits Credit Carry-backs—If the claim for credit or refund relates to an overpayment attributable to a net operating loss carry-back or to an unused excess profits credit carry-back, in lieu of the three-year period of limitation prescribed in paragraph (1), the period shall be that period which ends with the expiration of the fifteenth day of the thirty-ninth month following the end of the taxable year of the net operating loss or the unused excess profits credit which results in such carry-back, or the period prescribed in paragraph (3) in respect of such taxable years, whichever expires later. In the case of such a claim, the amount of the

that prescribed by the quoted regulations, was not filed within the time required under section 322 (b) (6). It is even more obvious that petitioner's "amendment of claim" filed January 20, 1954, was not in and of itself an application or claim filed within the prescribed time. That such an application or claim must be filed within the time prescribed by section 322 (b) (6) cannot be doubted. Lockhart Creamery, 17 T. C. 1123, 1140; Barry-Wehmiller Machinery Co., 20 T. C. 705. Cf. Packer Publishing Co. 17 T. C. 882, 898.

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credit or refund may exceed the portion of the tax paid within the period provided in paragraphs (2) or (3), whichever is applicable, to the extent of the amount of the overpayment attributable to such carry-back.

Sec. 722. General Relief—Constructive Average Base Period Net Income.

* * *

(d) Application for Relief Under This Section—* * * The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable years, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

However, petitioner contends that the application for relief filed by it on May 15, 1945, on Form 991 for the year 1944 was itself sufficient, since it was the form required by the regulations, that form required "no special or express statement in the case of an unused excess profits carry-back," the respondent knew that a tentative carry-back claim of unused excess profits credit for 1945, computed without regard to section 722 had already been allowed to it for 1944, the information necessary for the computation of a constructive average base period net income for 1945 was before respondent in statements attached to applications for relief under

---

Regulations 112:,

Sec. 35.722-5. Application for relief under section 722 (a)——

* * *

In order to obtain the benefits of an unused excess profits credit for any taxable year for which an application for relief on Form 991 (revised January, 1943) was not filed, using the excess profits credit based on a constructive average base period net income as an unused excess profits credit carry-over or carry-back, the taxpayer, except as otherwise provided in (d) of this section, must file an application on Form 991 (revised January, 1943) for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied within the period of time prescribed by section 322 for the filing of a claim for credit or refund for such latter taxable years. In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, and shall claim the benefit of the unused excess profits credit carry-over or carry-back.* * *

section 722 relating to prior years, but incorporated by reference in the application for 1944, and the implicit application for a tentative carry-back recognized by its allowance was sufficient even though it made no request for the employment of a constructive average base period net income for 1945 in computing the unused excess profits credit carry-back for that year available to petitioner for 1944.

In substance, it seems to us that similar arguments were made by the taxpayer in St. Louis Amusement Co., 22 T.C. 522. The crucial fact is that no application or claim filed by petitioner within the period prescribed by section 322 (b) (6) asserted a claim for carry-back of unused excess profits credit from the year 1945 based upon constructive average base period net income for that year. Therefore, we conclude that the application for relief filed by petitioner on May 15, 1945, was not a claim for an unused excess profits credit arising under the use of a constructive average base period net income for carry-back purposes.

Petitioner contends that "even if the original claim filed was defective because it did not expressly request that the unused excess profits carry-back from 1945 be computed by employment of a CABPNI for 1945, such defect was cured by petitioner's letter of May 7, 1951, to the Excess Profits Tax Council." This contention is rejected on the authority of St. Louis Amusement Co., supra.

Petitioner further contends that even though a timely claim was not filed, there was a waiver on

the part of respondent in that a determination of the constructive average base period net income of petitioner for 1945 was made by the Excess Profits Tax Council after the receipt of petitioner's letter of May 7, 1951. This contention of petitioner is rejected on the authority of May Seed and Nursery Co., 24 T. C. 1131.

The issue presented to us for decision in this proceeding is decided in favor of respondent.

Reviewed by the Special Division.

Decision will be entered under Rule 50.

Filed May 31, 1956.

Served June 1, 1956.

Entered June 1, 1956.

The Tax Court of the United States
Washington

Docket No. 45914

UTILITY APPLIANCE CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion filed in the above-entitled proceeding on May 31,

1956, counsel for the parties filed, on July 13, 1956, an agreed recomputation of petitioner's tax liability. Now, therefore, it is

Ordered and Decided: that there is a deficiency in petitioner's income tax for the year 1944 in the amount of $20,789.27; and that there is an overpayment in petitioner's excess profits tax for the year 1944 in the amount of $39,058.02, which overpayment was made within two years before the application for relief. Section 322 (d), Internal Revenue Code of 1939.

[Seal] /s/ JOHN W. KERN,
Judge.

Served July 26, 1956.

Entered July 26, 1956.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 45914

UTILITY APPLIANCE CORPORATION,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITION FOR REVIEW

The above-named petitioner, by George T. Altman, attorney, hereby files its petition under the

provisions of section 1142 of the Internal Revenue Code of 1939 (as made effective by section 7851 (b) (1) of the Internal Revenue Code of 1954) for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States entered July 26, 1956, determining an overassessment of excess profits taxes and a deficiency in income taxes for the year 1944 under the provisions of section 722 of the Internal Revenue Code of 1939, but holding as to a part of the relief applied for that it was barred by the statute of limitations. For the purpose of this review petitioner shows:

I.

Facts Relating to Venue

Petitioner is a California corporation and has its principal office in Beverly Hills, California. The returns for the years involved here were filed with the Collector of Internal Revenue for the Sixth District of California.

II.

Nature of Controversy

The controversy involves solely a question of the statute of limitations on applications for relief under I.R.C. 1939, section 722. Applications for relief were timely filed for the years 1940 to 1944, inclusive. None was filed for 1945 because of a net operating loss in that year. Also, the application for 1943 became moot because the excess profits tax paid for that year was refunded due to a net operat-

ing loss in 1945. That loss resulted in carry-backs to 1943 which eliminated any excess profits tax liability for that year. The carry-back of the 1945 unused excess profits credit, moreover, as computed without regard to section 722, was not all used up in 1943, so that there was, without regard to section 722, a carry-back of unused excess profits credit from 1945 to 1944. Thus section 722 could be given effect as to 1943 and 1945 only by way of increasing an already created carry-back of unused excess profits credit from 1945 to 1944.

The Commissioner, in his statutory notice relating to the applications under section 722, granted relief for all years in which excess profits tax had been paid and not previously refunded, that is, 1940, 1941, 1942 and 1944. He allowed a carry-back of unused excess profits credit from 1945 to 1944 but in computing that carry-back he refused to apply a constructive average base period net income computed under section 722 for 1943 and 1945. He based such refusal on the ground that no timely application in respect to 1943 and 1945 for carry-back purposes had been filed. He agreed, however, that the amount of such a constructive average base period net income would, if a timely application in respect thereto had been filed, be the same as for the years 1941, 1942, and 1944. 1940 was in a separate category because of the "variable credit rule" and the deduction in that year for income taxes.

In the petition filed in the Tax Court, petitioner assigned two errors, one as to the Commissioner's refusal to use a constructive average base period

net income for 1943 and the other as to his refusal to use a constructive average base period net income for 1945, both in connection with the computation of the unused excess profits credit carry-back from 1945 to 1944. The facts were all stipulated, and in the stipulation respondent conceded the use of a constructive average base period net income for 1943 in arriving at the said carry-back.

The sole issue which remained to be decided by the Tax Court was whether there was a timely application for relief for 1944 effective to allow use of a constructive average base period net income for 1945 in computing the carry-back to 1944 of the unused excess profits credit for 1945. It is petitioner's contention that the original application for relief filed for 1944 was sufficient to encompass use of section 722 in determining the excess profits credit of any year involved in computing the excess profits tax for 1944. Such years necessarily included 1943 and 1945, involved by way of the carry-back from 1945 to 1944. The Commissioner conceded this as to 1943, in computing the carry-back from 1945 to 1944, but denied it as to 1945, in computing the very same carry-back. Even if the original application for relief for 1944 was not broad enough to accomplish this, petitioner contends that a letter written by it in May, 1951, addressed to the division of the office of the Commissioner then considering the matter, was sufficient for this purpose.

III.

The petitioner being aggrieved by the conclusions

of law contained in the findings and opinion of the Tax Court, and by its decision entered herein, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ GEORGE T. ALTMAN,
Attorney for Petitioner on Review.

Filed October 19, 1956, T. C. U. S.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: John Potts Barnes, Chief Counsel, Internal Revenue Service.

You are hereby notified that I, George T. Altman, did, on the 19th day of October, 1956, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of The Tax Court heretofore rendered in the above-entitled cause. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 16th day of October, 1956.

/s/ GEORGE T. ALTMAN,
Attorney for Petitioner on Review.

Service of copy acknowledged.
Received and Filed October 19, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 23, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record," including joint exhibits 1-A through 13-M, attached to Stipulation of Facts, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court case has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States at Washington, in the District of Columbia, this 9th day of November, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15369. United States Court of Appeals for the Ninth Circuit. Utility Appliance Corporation, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed November 23, 1956.

Docketed November 27, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15369

UTILITY APPLIANCE CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

The points on which petitioner intends to rely on this appeal are as follows:

1. Section 322(b)(6) of I.R.C. 1939 is a remedial provision and does not reduce the period allowed under section 322(b)(1).

2. Petitioner filed the form required by the regulations for the purpose of using a CABPNI (constructive average base period net income) for 1945 in computing the unused excess profits credit carry-back allowed from 1945.

3. The form required by the regulations required no special or express statement in the case of an unused excess profits credit carry-back.

4. Petitioner submitted all of the information required by the regulations for the purpose of using a CABPNI for 1945 in computing the unused excess profits credit carry-back allowed from 1945.

5. Petitioner made the claim of benefit of the unused excess profits credit carry-back required by the regulations.

6. Even if the original claim filed was defective because it did not expressly request that a CABPNI for 1945 be used in the computation of the unused excess profits carry-back allowed from 1945, such defect was cured by petitioner's amendatory letter dated May 7, 1951, to the Excess Profits Tax Council, the division of the Commissioner's office before which the claim was then pending, followed by consideration of the claim on the merits by the Commissioner.

7. A letter acknowledged and acted upon is adequate as an informal claim or amendment of a claim.

8. An amendment of a claim did not present a new ground where, as here, it did not require the Commissioner to make a new and different inquiry from that which he was called upon to make under the original claim.

Respectfully submitted,

GEORGE T. ALTMAN,
Counsel for Petitioner.

[Endorsed]: Filed November 29, 1956, U.S.C.A.

No. 15369

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UTILITY APPLIANCE CORPORATION, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF.

GEORGE T. ALTMAN,
233 South Beverly Drive,
Beverly Hills, California,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 15369

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UTILITY APPLIANCE CORPORATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

Jurisdiction.

This proceeding involves determination of federal excess profits taxes for the calendar year 1944. The jurisdiction of this court is based on sections 1141 and 1142, I. R. C. 1939, as continued in effect by section 7851(b)(1), I. R. C. 1954. The jurisdiction of the Tax Court was based on section 732, I. R. C. 1939.

The notice of deficiency was issued October 8, 1952. [R. 12.] On December 12, 1952, petitioner filed a petition in the Tax Court of the United States. [R. 3.] The Tax Court's decision was entered July 26, 1956. [R. 4.] On October 19, 1956, petitioner filed its petition for review herein and served upon respondent notice of the filing thereof. [R. 4.]

Petitioner is a California corporation. Its principal office is at Beverly Hills, California. Its returns were filed with the Collector of Internal Revenue for the Sixth District of California. [R. 24.]

The jurisdiction of this court is not denied by I. R. C. 1939, section 732(c). The reason is that while the issue here arises under section 722(d), that section expressly makes such issue dependent upon section 322. As a result the issue here is not one the determination of which is necessary solely by reason of section 722.

Statement Regarding Statutory Provisions Involved.

The pertinent provisions of the Internal Revenue Code of 1939 are shown herein in the Appendix.

Under the World War II excess profits tax law provisions were enacted for the purpose of limiting the subject of that tax to the excess profits resulting from war activity. As a means to that end, taxable income otherwise computed for the purpose of that tax was reduced by an "excess profits credit" intended to represent the normal earnings of the taxpayer. Under section 713 of I. R. C. 1939, the excess profits credit was computed by taking 95 per cent of the corporation's "average base period net income," the latter being a factor determined under several alternative formulae on the basis of the income of the corporation for the years 1936 to 1939, inclusive, known as the "base period." Under section 714 the credit was computed by taking 8 per cent of the corporation's invested capital. Whichever resulted in the lower excess profits tax was applicable.

In computing net income both for income tax and excess profits tax purposes, a net operating loss in any

year could be carried back and forward, two years in each direction. Thus a net operating loss in 1945 would be carried back to 1943, that is, allowed as a deduction in 1943. Any excess over the net income otherwise computed for 1943, in other words the amount of the carry-back not used up in 1943, would be allowed as a deduction in 1944. A similar scheme, applicable only to excess profits taxes, was the "unused excess profits credit" carry-back and carry-over, also two years in each direction. The "unused excess profits credit" for any year was the excess of the excess profits credit for that year over the net income for that year as determined for excess profits tax purposes. Thus, if a corporation had such an unused excess profits credit for 1945, it would be carried back to 1943 and any portion thereof not used up in 1943 would be allowed in 1944.

Conceiving the possibility that the formulae of sections 713 and 714 would not actually arrive at normal earnings in many cases, Congress included a general relief provision, section 722. In section 722(b) specific situations were set forth under which relief was to be allowed. In the case at bar relief was sought under section 722(b)(4), which applied where "the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business." It was also provided, under section 722(a), that conditions occurring or existing after 1939 could not be taken into account except in certain limited situations for the purpose of determining "normal earnings." Nowhere under any provision of statute or regulation was it possible for "normal earnings" to be different for the

made by the Commissioner and a revenue agent's report was issued under date of June 10, 1947. [R. 25.] In that report a carry-back of unused excess profits credit from 1945 to 1944, computed as before without regard to section 722, was allowed. [R. 25.] Subsequently, in 1948 and 1949, additional excess profits taxes were assessed and paid for 1944. [R. 27.] In the computation of those additional taxes, that carry-back from 1945 to 1944 of unused excess profits credit was still allowed. [R. 30.] In the deficiency notice which the Commissioner eventually issued for 1944, on October 8, 1952, and which resulted in the petition here involved to the Tax Court, that carry-back of unused excess profits credit from 1945 to 1944 was still allowed. [R. 24-25.]

The application for relief which petitioner filed for 1944 on May 15, 1945, was on Form 991 as required and was supported as to evidentiary details concerning the base period by a reference to statements attached to the corresponding application filed by the petitioner for the year 1942. [R. 27.] Nothing in the form required the petitioner to disclose how the amount of reduced tax claimed was computed and no such schedule was attached. [R. 27.]

On February 28, 1949, petitioner filed a claim for refund on Form 843, as a supplement to the application for relief for 1944 filed on Form 991, to show the payments of tax made after that application was filed. [R. 28.] The Tax Court states that the application filed on Form 991 and the claim filed on Form 843 "compre-

hended" a constructive average base period net income for 1944 "without claiming the benefit of any carry-back of unused excess profits credit from 1945 computed either with or without regard to section 722." [R. 28-29.] As to the application filed on Form 991, that, as observed above, contained no statement showing how the reduced tax claimed was computed, nor was any such statement required by the form. As to the Form 843 filed on February 28, 1949, after, as noted above, a carry-back of unused excess profits credit was in three different determinations allowed by the Commissioner, and never refused, the failure to include in the computation a factor for *any* carry-back of unused excess profits credit obviously represented a mere oversight which the Commissioner, in his notice of deficiency, waived, a carry-back being in such notice allowed.

On May 7, 1951, petitioner mailed a letter to the Excess Profits Tax Council, the division of the Commission's office before which petitioner's applications for relief were then pending on the merits, specifically claiming that the carry-back from 1945 be determined by employment of a constructive average base period net income for 1943 and 1945. That letter also pointed out that the carry-back had been a matter of discussion in conference with the office of the Commissioner's "Internal Revenue Agent in Charge" and with the Commissioner's "Technical Staff," and specifically referred in that connection to a letter from the Internal Revenue Agent in Charge dated December 3, 1948. [R. 30-31.] The Excess

Profits Tax Council acknowledged that letter in writing. [R. 31.] Nowhere does the record show any denial by respondent of the fact of the discussion referred to.

Several conferences and considerable correspondence with the office of the Commissioner relating to the merits of the case occurred after the date of that letter and before the Commissioner's final determination. [R. 31.] The final determination of the Commissioner was made on September 19, 1952. [R. 31.] That determination was formally issued as a statutory notice on October 8, 1952. [R. 12.] The Commissioner in that statutory notice granted relief under section 722 for all years in which excess profits tax had been paid and not previously refunded, that is, the years 1940, 1941, 1942, and 1944. He thus determined and applied a constructive average base period net income for each of those years. [R. 15.] In determining the amount of reduced tax for 1944 he also allowed a carry-back of unused excess profits credit from 1945 to 1944 but in computing that carry-back he refused to apply a constructive average base period net income computed under section 722 for 1943 and 1945. [R. 24-25, 16.]

He based such refusal on the ground that no timely application for relief in respect to 1943 and 1945 for carry-back purposes had been filed. [R. 16.] He agreed, however, that the amount of such constructive average base period net income would, if a timely application in respect thereto had been filed, be the same as for the years 1941, 1942, and 1944. [R. 15-16.] 1940 was in

a separate category because of the "variable credit rule" referred to above, p. 4, and also because of the deduction allowed only for that year for income taxes. (I. R. C. 1939, section 711(b)(1)(A), repealed, Rev. Act of 1941, section 202(c)(2).)

Thereupon petitioner filed its petition in the Tax Court. [R. 3.] In that petition, petitioner assigned two errors, one as to the Commissioner's refusal to use a constructive average base period net income for 1943 and the other as to his refusal to use a constructive average base period net income for 1945, both in connection with the computation of the unused excess profits credit carry-back from 1945 to 1944. [R. 7.] In the Tax Court respondent conceded the use of a constructive average base period net income for 1943 in arriving at the said carry-back. [R. 25.]

Thus the Commissioner allowed a carry-back of unused excess profits credit from 1945 to 1943 and 1944, and in determining the portion of that carry-back used up in 1943, and thereby the balance remaining for 1944, he allowed the use of a constructive average base period net income computed under section 722 for 1943. The sole issue, then, which remained to be decided by the Tax Court was whether the application for relief filed for 1944 was effective to allow use of a constructive average base period net income computed under section 722, for 1945 also, in determining the balance of the unused excess profits credit for that year to be carried back to 1944.

Specifications of Error.

Petitioner specifies the following error of the Tax Court:

The failure to determine that the application for relief filed for 1944, as timely amended, was effective to allow use of a constructive average base period net income computed under section 722 for 1945 in determining the portion of the unused excess profits credit for that year to be carried back to 1944.

Summary of Argument.

The forms and other information which petitioner timely filed with the Commissioner complied with the statute and the regulations as claim for use of a constructive average base period net income for 1945 in computing the unused excess profits credit carry-back from that year. Petitioner filed the required application for relief within the time allowed. No other claim is required by the statute. Petitioner also within that time furnished all of the information required.

Petitioner likewise made the claim of carry-back of unused excess profits credit required by the regulations. Such a carry-back, computed without regard to section 722, was allowed by the Commissioner in every computation made by the Commissioner both before and after the expiration of the period of limitations on filing claims for 1944. This included every computation made by the Commissioner in connection with the application for relief for 1944 involved in this proceeding.

There was, it is true, during the period allowed for filing claims, no specific written request for the use of a

constructive average base period net income for 1945 in computing the carry-back involved. The regulations, however, do not require that. Moreover, the Commissioner allowed a constructive average base period net income for each one of the prior years, that is, 1941, 1942, 1943, and 1944, in an identical amount for each such year, and the facts required for 1945, being facts relating to the base period only, were identical in all respects to those required for the years 1941 through 1944. The Commissioner has, in fact, agreed that the constructive average base period net income for 1945, if timely claimed, would also be the same amount as for each of the years 1941 through 1944. Under such circumstances the Tax Court itself has treated the use of a constructive average base period net income in computing a carry-back as automatic so as to be allowable without even mention in the pleadings.

In any case, while the application for relief for 1944 was pending on the merits before a division of the Commissioner's office, petitioner did make a specific written request for use of a constructive average base period net income for 1945 in computing the carry-back to 1944. Since all of the information required was already before the Commissioner and no new or different examination was involved such request was a proper amendment of the original claim although made after the period for filing claims had expired. Furthermore, the Commissioner made a determination on the merits of such constructive average base period net income for 1945 and thereby waived any defect in the original claim.

ARGUMENT.

1.

Petitioner Timely Filed the Form Required by the Regulations for the Purpose of an Unused Excess Profits Credit Carry-back for 1945 Computed by Use of a CABPNI for That Year.

The statute, section 722(d), requires only that an application for relief be made "in accordance with regulations prescribed by the Commissioner with the approval of the Secretary." The regulations so prescribed, Regulations 112, section 35.722-5(a), provide to the extent pertinent as follows:

> "In order to obtain the benefits of an unused excess profits credit for any taxable year for which an application for relief on Form 991 (revised January, 1943) was not filed, using the excess profits credit based on a constructive average base period net income as an unused excess profits credit carry-over or carry-back, the taxpayer, except as otherwise provided in (d) of this section, must file an application on Form 991 (revised January, 1943) for the taxable year *to which* such unused excess profits credit carry-over or carry-back is to be applied within the period of time prescribed by Section 322 for the filing of a claim for credit or refund for such latter taxable year." (Italics added.)

Petitioner complied with this requirement, for it filed, on May 15, 1945, an application for relief on Form 991, for the taxable year 1944. No schedule was attached showing how the reduced tax claimed was computed but no such schedule was required by the form.

2.

Petitioner Submitted All of the Information Required by the Regulations for an Unused Excess Profits Credit Carry-back From 1945 Computed by Use of a CABPNI for That Year.

Respondent will point to the sentence in the regulations which follows that quoted above. That sentence is:

> "In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, . . ."

In its application for relief for 1944, petitioner incorporated by reference the statements giving the details concerning the base period which it had attached to applications for relief for prior years. The facts required for determination of a constructive average base period net income for 1945 could not be any different, not even one iota, from the facts required and submitted as to the prior years. The facts required were facts relating to the base period and not to the respective excess profits tax taxable years. This is shown by the fact that the Commissioner has agreed that the same CABPNI which applied to 1944, 1943, 1942, and 1941 would also apply to 1945 if the claim was timely in respect to that year. This is also shown by the case of *Jacob's Fork Pocahontas Coal Company v. Commissioner,* 24 T. C. 60. There the taxpayer, just as petitioner here, sought relief under section 722(b)(4). A decision of the Tax Court denying relief had been entered in respect to the excess profits tax years 1940, 1941, and 1942, and the taxpayer sought such relief for the years 1943, 1944, and 1945. The

Tax Court there held on the basis of collateral estoppel that the proceeding for the later years was concluded by that for the earlier. The Tax Court there stated that the basis for relief "must have foundation in the same set of facts."

To the same effect, *George Kemp Real Estate Company v. Commissioner,* 17 T. C. 755, affirmed C. A. 2, 205 F. 2d 236, cert. denied 346 U. S. 876. And in *Ainsworth Manufacturing Corporation v. Commissioner,* 24 T. C. 173, the Tax Court held that where, as here, the "variable credit rule" was inapplicable to the unused excess profits credit year, a CABPNI for that year could be applied under Rule 50, as a mere matter of computation, even though no claim therefor had been made in the pleadings.

It follows that petitioner complied with the requirement in the regulations above quoted "for a complete statement of the facts" in respect of the unused excess profits credit year, that is, 1945.

3.

Petitioner Made the Necessary Claim for Carry-back Based on a CABPNI for 1945.

(a) Petitioner Made the Claim of Benefit of the Unused Excess Profits Credit Carry-back Required by the Regulations Promulgated Under Section 722.

Respondent will point to the requirement in the same regulations quoted above that the application for relief shall "claim the benefit of the unused excess profits credit carry-over or carry-back." But the claim for such a benefit was made, although not on that form. It was made in the claim for tentative carry-back. It was allowed by the revenue agent in the revenue agent's report dated June 10, 1947. It was involved in discussions with

the Internal Revenue Service. Indeed, it was formally allowed by the Commissioner, as shown by his deficiency letter.

All of these procedures, including the tentative carry-back claim, the revenue agent's report, the discussions, and the final allowance of a carry-back, must be given effect as informal pieces of information in determining what grounds were presented. *Keneipp v. U. S.* (App. D. C.), 184 F. 2d 263. To the same effect, *Bonwit Teller & Company v. U. S.*, 283 U. S. 258, where the Supreme Court stated, at p. 265:

> "The Commissioner, within the time allowed, was advised of the grounds on which plaintiff's right to refund rested, and was not misled or deceived by plaintiff's failure to file formal claim and was fully warranted in holding that the waiver and earlier documents were sufficient. *Tucker v. Alexander,* 275 U. S. 228, 231."

In the *Tucker* case there cited the Supreme Court stated, at p. 231:

> "The statute and regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery."

It is clear that the claim of an unused excess profits credit carry-back was timely made by petitioner and that the Commissioner was in full notice of its claim.

It is true that within the time allowed for filing claims there was no specific written request for the employment of a CABPNI in computing the unused excess

profits credit carry-back. But the form provided, Form 991, does not require this. Nor do the regulations themselves, as quoted above, require this. They require only that there be a claim for the benefit of the unused excess profits credit carry-back.

No perfection of phrasing is required by the regulation. Nor could it be required. If the regulations require more they go too far. *Miller v. Commissioner* (C. A. 5), 237 F. 2d 830, 836-37. As stated in *United States v. Memphis Cotton Oil Co.,* 288 U. S. 62, 53 S. Ct. 278, at 288 U. S., p. 71:

> "The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research."

Respondent cannot point to a single fact which could possibly have been added to its information by such a nicety of wording in the application for relief as a request specifically for employment of the CABPNI in computing the unused excess profits credit for 1945.

(b) The Special Statutory Provision on Limitations Relating to Carry-back Claims, Section 322(b)(6) of I. R. C. 1939, Being a Relief Provision, Should Be Liberally Construed.

All that section 722(d) requires that there be filed within the period prescribed in section 322 is an "application for relief"—nothing more. Section 322(b)(6), relating to carry-backs, merely enlarges the time allowable to the extent to which a claim is based on carry-back.

Claremont Waste Manufacturing Co. v. Commissioner (C. A. 1), 238 F. 2d 741, decided November 16, 1956, where the court stated, at p. 748:

> "Thus, as the Tax Court pointed out, the purpose of section 322(b)(6), as amended, was in general to provide a special period of limitation over and above the three-year period found in section 322(b)(1) for claims for refund based on credit carry-backs, 'since the extent or existence of unused credits might often be unknown to the taxpayer until after the normal peroid of limitations for such claims had expired.'"

In *Bonwit Teller & Company v. U. S., supra,* precisely involving such a situation the Supreme Court stated, at p. 263:

> "Manifestly it [the increase in time allowed] is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide."

(c) It Has Also Been Held That the Unused Excess Profits Credit Carry-back Is Mandatory, and That No Actual Claim Is Required.

The unused excess profits credit carry-back may in certain situations increase instead of decrease the tax. The application of the carry-back, it has been held, is mandatory. It follows that the taxpayer has no choice, and that an actual claim is not necessary. The Commissioner's contention to that effect has been upheld by the Court of Claims in *Dravo Corporation v. U. S.,* 138 F. Supp. 274.

4.

Even if the Original Claim Filed Was Defective Because It Did Not Expressly Request That the Unused Excess Profits Carry-back From 1945 Be Computed by Employment of a CABPNI for 1945, Such Defect Was Cured by Petitioner's Letter of May 7, 1951, to the Excess Profits Tax Council.

(a) The Letter of May 7, 1951, Was Properly Addressed to the Excess Profits Tax Council.

At the time the letter was sent the application for relief was being considered on the merits by the Excess Profits Tax Council. The Council formally acknowledged the letter, and thereafter a determination of CABPNI for 1945, the year here involved as the unused excess profits tax year, was made by the Commissioner.

The Excess Profits Tax Council is a field group established under the Commissioner of Internal Revenue to make final determinations for him on all matters involving section 722 of I. R. C., 1939. Mim. 6044, 1946-2 C. B. 97. The issue here involves section 722(d), by virtue of which the time for filing applications for relief is made to depend on section 322. The timeliness of the application for relief was, moreover, necessarily before the Council, because the existence of a proper application was essential to the determination of relief, precisely as, in *United States v. California Eastern Lines,* 348 U. S. 351, 354-355, involving a determination of the amount of profits, "the existence of a renegotiable contract" was "essential to such a determination."

(b) The Letter of May 7, 1951, Presented No New Ground for Relief, but Was Only Amendatory of the Grounds Stated in the Original Application.

On this question a claim is like a pleading. Thus, in *United States v. Andrews,* 302 U. S. 517, the Supreme Court stated, at p. 521:

> "We held that, while the Commissioner might promptly have rejected the claims for failure to comply with the regulation, such compliance was a matter he could waive and, if he considered the merits, the claim was susceptible of any amendment which would not amount, under the rules of pleading in actions of law, to an alteration of the cause of action and would not require the Commissioner to make a new and different inquiry than that which he was called upon to make in order to consider the general grounds asserted in support of the claim as presented."

Here clearly there is no change in the cause of action. The relief sought was a reduction in excess profits tax for 1944 under the provisions of section 722, I. R. C. 1939.

Furthermore, as shown above, under Point 2, no new facts were involved in the amendment here. In *Addressograph-Multigraph Corp. v. U. S.,* 112 Ct. Cls. 201, 78 F. Supp. 111, the court quoted from *Pink v. U. S.* (C. A. 2), 105 F. 2d 183, as follows:

> "Where the facts upon which the amendment is based would necessarily have been ascertained by the Commissioner in determining the merits of the original claim, the amendment is proper. *Bemis Bro. Bag Co. v. U. S.,* 289 U. S. 28; *United States v. Memphis Cotton Oil Co.,* 288 U. S. 62; *United States v. Factors and Finance Co.,* 288 U. S. 89. The

> rule is otherwise when the amendment requires the examination of new matters which would not have been disclosed by an investigation of the original claim. *United States v. Andrews,* 302 U. S. 517; *United States v. Garbutt Oil Co.,* 302 U. S. 528; *Marks v. United States,* 98 Fed. (2d) 564."

To the same effect, *Allegheny Heating Co. v. Lewellyn* (C. A. 3), 91 F. 2d 280. The court there, distinguishing other cases, stated, at p. 283:

> "In the instant case, as we have seen, the amendment was fundamentally related to the original claim, in that it involved no new facts whatever so far as the taxpayer, its income and records were concerned, but merely the application of a different remedy based upon the same facts."

As in that case, so here, no new facts whatever were involved. The facts involved related only to the base period. It follows that the letter of May 7, 1951, presented no new ground for relief, but was only amendatory of the grounds stated in the original application, and therefore cured any defect in the original application covered by the amendment.

5.

It Is Immaterial That the Letter Was Filed After the Statute Had Run.

At the time the letter of May 7, 1951, was filed, the claim was still being considered on the merits and many conferences followed. The Commissioner even made a determination of what the CABPNI would be for use in computing the unused excess profits credit for 1945. Not until that final decision of his did he complain that the claim was not timely filed or that the claim timely

filed was defective in respect to carry-back. In *United States v. Elgin National Watch Co.* (C. A. 7), 66 F. 2d 344, 346, 10 Mertens (Revised 1948) 332, n. 90, the original claim was defective, and the amendment was made after the statute had run. The case there also involved excess profits tax relief, which was known at that time as "special assessment." The original claim was defective in that it failed to set forth in detail each ground upon which it was based. The Commissioner, however, had failed to object to that defect until the time for payment had arrived. The court there, overruling the Commissioner, stated, at page 346:

> "That the Commissioner may waive such an objection to form we think there can be no doubt."

The court there also, citing, among others, the case of *United States v. Memphis Cotton Oil Co., supra,* stated, at page 347:

> "Those cases hold that a claim for a tax refund which has been seasonably filed, but which fails to conform to Treasury Regulations, may be amended at any time before the original claim has been finally rejected, although it be after the time when a wholly new claim would be barred by limitation."

To the same effect, *Allegheny Heating Co. v. Lewellyn, supra.*

Indeed, it seems that the Tax Court because of this point has now repudiated the decision which it rendered in this very proceeding. In *Wilmington Gasoline Company v. Commissioner,* 27 T. C. #55, decided December 12, 1956, the Tax Court, citing *United States v. Memphis Cotton Oil Co., supra,* and *Angelus Milling Co. v. Commissioner,* 325 U. S. 293, decided for the taxpayer on the basis of facts identical to the facts here. There, as

here, there had been a claim for carry-back of unused excess profits credit not based on section 722. That claim, having been allowed, was in itself no longer in existence and could not as a result itself be amended. *Mutual Life Ins. Co. v. U. S.* (Ct. Cls.), 49 F. 2d 662, cert. denied, 284 U. S. 628; 10 Mertens ¶58.19. The Tax Court nevertheless recognized it as a factor before the Commissioner in connection with a timely application for relief under section 722, and held that an amendment after the statute had run claiming determination of the carry-back under section 722 was timely. The court there quoted from the *Angelus Milling Co.* case in part as follows:

> "If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it. Even tax administration does not as a matter of principle preclude considerations of fairness."

It is clear that the Tax Court itself is no longer in agreement with its decision in this proceeding and that if the Tax Court had this case before it again it would hold, as it should, that the letter of May 7, 1951, properly amended petitioner's application for relief although sent after the statute had run.*

As to the supplementary claim filed by petitioner on February 28, 1949, in which through obvious oversight

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*While this is not of record before this court, respondent in its brief before the Tax Court in the *Wilmington Gasoline Company* case cited the Tax Court's decision in the case here six times and placed its entire reliance upon it. It appears that the Tax Court there deliberately repudiated its decision in the case here.

petitioner omitted to make a separate addition for *any* carry-back, computed with or without regard to section 722, it is of course clear that the Commissioner's subsequent allowance, in his statutory notice, of a carry-back computed without regard to section 722, his allowance thereafter in computing that carry-back of a CABPNI under section 722 for 1943, and his further computation of what the CABPNI would be for 1945, represent a complete waiver of that omission, under the principles stated above.

6.

It Is Immaterial That the Amendment Was Made by Letter Instead of on a Form.

In *United States v. Kales,* 314 U. S. 186, 62 S. Ct. 214, a letter of protest to the Commissioner was held to constitute a claim for refund. In *Bonwit Teller & Company v. U. S., supra,* a waiver was held to constitute a claim for refund. In *Crenshaw v. Hrcka* (C. A. 4), 237 F. 2d 372, decided October 16, 1956, a letter saying that the taxpayer there would pay certain assessments and then claim a refund was held to constitute a claim for refund. To hold otherwise, the court there stated, at p. 373, would be "to return to the reign of senseless technicality from which the courts have happily freed themselves." In the *Elgin* and *Allegheny* cases, cited above, briefs were treated as claims. As all these cases show, if a claim is considered on the merits, its informality is waived. As the *Elgin* and *Allegheny* cases also show, that is just as true of an amendment to a claim, filed after the statute has run, as of an original claim. As shown in *Smale & Robinson, Inc. v. U. S.* (D. C., S. D., Cal.), 123 F. Supp. 457, the cases supporting that proposition are legion.

Conclusion.

Petitioner states in conclusion that it did all that was necessary in bringing to the notice of the Commissioner its claim for the use of a constructive average base period net income for 1945 in computing the portion of its unused excess profits credit for 1945 to be carried back to 1944, and that the use of such a constructive average base period net income should have been allowed.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Petitioner.

APPENDIX.

Statutory Provisions Involved.

Internal Revenue Code of 1939.

SEC. 322. REFUNDS AND CREDITS.

* * * * * * * * *

(b) Limitation on Allowance.—

(1) Period of Limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * * * * * *

(6) Special Period of Limitations With Respect to Net Operating Loss Carry-Backs and Unused Excess Profits Credit Carry-Backs.—If the claim for credit or refund relates to an overpayment attributable to a net operating loss carry-back or to an unused excess profits credit carry-back, in lieu of the three-year period or limitation prescribed in paragraph (1), the period shall be that period which ends with the expiration of the fifteenth day of the thirty-ninth month following the end of the taxable year of the net operating loss or the unused excess profits credit which results in such carry-back, or the period prescribed in paragraph (3) in respect of such taxable year, whichever expires later. In the case of such a claim, the amount of the credit or refund may exceed

the portion of the tax paid within the period provided in paragraph (2) or (3), whichever is applicable, to the extent of the amount of the overpayment attributable to such carry-back.

SEC. 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) General Rule.—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that in the cases described in the last sentence of section 722 (b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character of its business under section 722(c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) Taxpayers Using Average Earnings Method.—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to

use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

* * * * * * * * *

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * *

* * * * * * * * *

(d) Application for Relief Under This Section.—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710(a)(5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

SEC. 732. REVIEW OF ABNORMALITIES BY BOARD OF TAX APPEALS [NOW THE TAX COURT OF THE UNITED STATES].

* * * * * * * * *

(c) Finality of Determination.—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721 or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.

Regulations 112, Section 35.722-5(a).

* * * * * * * * *

In order to obtain the benefits of an unused excess profits credit for any taxable year for which an application for relief on Form 991 (revised January, 1943) was not filed, using the excess profits credit based on a constructive average base period net income as an unused excess profits credit carry-over or carry-back, the taxpayer, except as otherwise provided in (d) of this section, must file an application on Form 991 (revised January, 1943) for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied within the period of time prescribed by section 322 for the filing of a claim for credit or refund for such latter taxable year. In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, and shall claim the benefit of the unused excess profits credit carry-over or carry-back. If an

application on Form 991 (revised January, 1943) for the benefits of section 722 has been filed with respect to any taxable year, or if the filing of such application is unnecessary under (d) of this section, and if the excess profits credit based upon a constructive average base period net income determined for such taxable year produces an unused excess profits credit for such year, to obtain the benefits of such unused excess profits credit as an unused excess profits credit carry-over or carry-back the taxpayer should file an application upon Form 991 (revised January, 1943), or an amendment to such application if already filed, for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied. Such application or amendment should be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied. In addition to all other information required, such application or amendment should incorporate by reference the data and information submitted in support of the application filed for the taxable year for which the unused excess profits credit arose, and in addition should claim the benefit of the unused excess profits credit carry-over or carry-back. * * *

No. 15369

In the United States Court of Appeals for the Ninth Circuit

UTILITY APPLIANCE CORPORATION, A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Tax Court (R. 23–36) is reported at 26 T. C. 366.

JURISDICTION

This petition for review involves a proceeding instituted before the Tax Court by the petitioner, Utility Appliance Corporation (hereinafter referred to as "taxpayer"), with respect to excess profits tax liability for the year 1944. (R. 5–16.)

The taxpayer is a California corporation, and filed its returns for the periods herein involved with the Collector for the Sixth District of California. (R. 24.)

By letter dated October 8, 1952 (R. 12–16), the Commissioner of Internal Revenue notified the tax-

payer that the determination of its excess profits liability[1] for the taxable years 1940 through 1944 resulted in certain over-assessments, as set forth in an accompanying statement (R. 14–16), and further advised the taxpayer that its applications for relief under Section 722 of the Internal Revenue Code of 1939[2] with respect to those taxable years had been allowed in part (as set forth in detail in the letter and accompanying statement). Further (R. 13), the letter gave notice to the taxpayer of the disallowance in part of its applications for relief and related claims for refunds for the years in question, pursuant to Section 732 of the Code.

From that notice, the taxpayer, within less than ninety days thereafter, namely, on December 12, 1952 (R. 3), filed its petition (R. 5–16) with the Tax Court under the provisions of Section 272 of the Code for a redetermination, with respect only to the year 1944, as to the Commissioner's partial rejection of the application for relief under Section 722 (R. 5, 6).

After submission of the cause,[3] the Tax Court entered its decision (R. 36–37) on July 26, 1956.

Within less than three months thereafter, namely, on October 19, 1956 (R. 4), the taxpayer filed a petition for review (R. 37–41) by this Court, purportedly pursuant to Section 1142 of the 1939 Code as con-

[1] The letter and accompanying statement also advised the taxpayer as to the determination with respect to its income tax liability (R. 12, 15)—which is not material in this proceeding.

[2] All Code references herein will be to the 1939 Internal Revenue Code, unless otherwise indicated.

[3] In the Tax Court, the cause was submitted pursuant to its Rule 30 (R. 4, 24)—which permits the submission of causes without trial or hearing where the facts are uncontested.

tinued in effect by Section 7851 (b) of the Internal Revenue Code of 1954 (R. 37–38).[4]

QUESTION PRESENTED

Whether the Tax Court was correct in holding, sustaining the action of the Commissioner, that in the computation of its excess profits tax liability for the year 1944 the taxpayer was not entitled to the benefit of an unused excess profits credit carry-back from the year 1945 based upon a constructive average base period net income under Section 722 of the 1939 Internal Revenue Code, where such carry-back was not claimed in a timely application or claim filed by the taxpayer pursuant to the requirements of Section 722 (d) and of the applicable Regulations.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

From the Commissioner's action (R. 12–16) with respect to the taxpayer's income and excess profits tax liabilities for the taxable years 1940 through 1944, the taxpayer instituted (R. 5–12) the present proceeding in the Tax Court to seek only (R. 6) a redetermination of its excess profits tax liability as to the year 1944 (R. 6, 24).

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[4] While we are not directly challenging the jurisdiction of this Court to review, we do not intend to concede that this Court has jurisdiction to review the decision of the Tax Court here, since, as hereinafter indicated, there might be a serious doubt as to that—in view of the prohibition contained in Section 732 (c) of the 1939 Code.

The parties, by their stipulation, finally submitted to the Tax Court for decision only the issue (R. 24) as to whether the taxpayer "has a timely claim" for an unused excess profits credit arising from the use of a constructive average base period net income for carry-back purposes, so that a constructive average base period net income for the year 1945 may be employed for the purpose of computing the unused excess profits credit carry-back from 1945 to 1944. The parties further stipulated (R. 24) the amount ($65,000) of constructive average base period net income for 1945 which is to be used in the event it is held that the constructive average base period net income for 1945 may be employed in the computation of an unused excess profits credit carry-back from 1945 to 1944.

The material facts, as recited by the Tax Court in its opinion, are as follows (R. 24–32):

The taxpayer is a corporation organized under the laws of the State of California. It filed its returns for the periods here involved with the Collector for the sixth district of California. (R. 24.)

The taxpayer had no excess profits net income for the year 1945, but had a deficit in such net income. Its excess profits credit for that year, computed without regard to Section 722, was $43,435.34 as computed under Section 713, and $55,180.66 as computed under Section 714. (R. 24.)

In the deficiency notice the Commissioner allowed an unused excess profits credit adjustment for the year 1944 in the amount of $10,884.69. That amount was computed without regard to Section 722, as follows (R. 24–25):

Unused excess profits credit for 1945	$55,180.66
Portion thereof first applied to 1943	44,295.97
Balance being unused excess profits credit carry-back to 1944	10,884.69

The foregoing computation appears in a revenue agent's report dated June 10, 1947. The correct amount to be first applied to 1943, as agreed by the Commissioner before the Tax Court, is $11,162.99 instead of the amount of $44,295.97. (R. 25.)

The Commissioner allowed to the taxpayer under Section 722 (b) (4), a constructive average base period net income of $39,000 for the year 1940, and $65,000 for each of the years 1941, 1942 and 1944. The Commissioner before the Tax Court also agreed to the employment of a like constructive average base period net income, $65,000, for the year 1943. The amount of $11,162.99, stipulated as the amount of excess profits credit carry-back from 1945 to be applied first to the year 1943, is computed as follows (R. 25–26):

Excess profits net income, 1943 per return	$98,170.66
Adjustments per revenue agent's report:	
Add: Declared value excess-profits tax overassessment	3,841.03
Total	102,011.69
Deduct: net income adjustment	29,098.70
Excess profits net income, 1943, as so adjusted	72,912.99
Deduct: 95% of $65,000, constructive average base period net income for 1943	61,750.00

Balance, being amount of unused excess profits credit for 1945 to be applied first to 1943 (whether the total amount of such credit for 1945 is computed with or without the use of a constructive average base period net income)	$11,162.99

The taxpayer filed its excess profits tax return for the year 1944 on May 15, 1945, pursuant to extension granted by the Commissioner to such date. The following payments of tax were made by the taxpayer on the dates indicated for excess profits tax liability for the year 1944 (R. 26–27):

Original Paid:			
3/15/45		$36,649.00	
5/15/45		6,497.03	
6/15/45		43,081.70	
9/17/45		43,081.70	
12/17/45		43,081.70	
Total		172,391.13	
Less: Interest		64.33	
Tax paid			$172,326.80
Additional Paid:			
10/11/48		$9,534.36	
11/10/48		11,054.18	
1/25/49		7,500.00	
2/14/49		7,794.84	
Total		35,883.38	
Less: Interest	$2,462.58		
Interest	1,762.12	4,224.70	
Tax paid			31,658.68
Total tax paid			203,985.48
Less: Allowance on tentative carry-back claim 11/25/46			20,678.27
			183,307.21

On May 15, 1945, the taxpayer filed an application on Form 991, for excess profits tax relief for the year 1944. This application asked for a reduction in excess profits tax under Section 722 in the amount of $90,153.56, from $221,224.89 to $131,071.33, computed in each case prior to the 10% credit for debt retirement. The application claimed a constructive average base period net income of $161,058.71, computed under Section 722 (b) (4). Details in support of the constructive average base period net income as claimed were incorporated in the application by reference from statements attached to Form 991 filed by the taxpayer for the year 1942. Nothing in the form required a schedule showing how the reduced tax claimed of $131,071.33 was computed, and no such schedule was attached. (R. 27.)

The reduced tax claimed of $131,071.33 was computed in conformance with Sections 710 and 711 of the Internal Revenue Code of 1939, as follows (R. 28):

Excess profits net income (income credit method)			$300,975.60
Specific Exemption		$10,000.00	
Constructive average base period net income claimed on Form 991	$161,058.71		
Constructive excess profits credit based on constructive income is 95% of the claimed constructive average base period net income		153,005.77	163,005.77

Adjusted excess profits net income after application of Section 722 as claimed----------	$137,969.83
Excess profits tax at rate of 95%-----	131,071.33

The amount of excess profits tax paid by the taxpayer at or prior to the filing of its claim for relief for 1944 on Form 991, that is, at or prior to May 15, 1945, was $43,081.70, and that amount was shown on Form 991 as the amount of refund or credit for which the application was a claim. Subsequently, on February 28, 1949, the taxpayer filed a claim on Form 843 to supplement the Form 991 and claimed a total refund of $79,446.59. The claim filed on Form 843 comprehended a constructive average base period net income for 1944 of $161,058.71, without claiming any carry-back of unused excess profits credit from 1945 based on a constructive average base period net income. (R. 28.)

Both the application filed by the taxpayer on Form 991 on May 15, 1945, for the year 1944, and the claim filed on Form 843 on February 28, 1949, for such year, comprehended a constructive average base period net income for 1944 of $161,058.71, without claiming any carry-back of unused excess profits credit from 1945 computed either with or without regard to Section 722. (R. 28–29.)

No agreement was entered into by the taxpayer and the Commissioner which would extend the statute of limitation for the year 1944 or 1945. (R. 29.)

On December 3, 1948, the Internal Revenue agent in charge at Los Angeles wrote to the taxpayer *inter alia,* as follows (R. 29–30):

> Reference is made to your claims for excess profits tax relief under section 722 of the Internal Revenue Code, filed for the years ended December 31, 1940, 1941, 1942, 1943, and 1944.
>
> In connection with these claims, it may be noted that the general average base period net income is $29,836.74, whereas under the growth formula, provided in section 713 (f) of the Code, you are entitled to use $45,168.23, excess profits net income for the year 1939 which is the highest income in base period years. Also, that excess profits tax paid for the year 1943 was refunded, due to a net operating loss and unused excess profits credit carry-back from 1945, and that in 1944 the 80% tax limitation is applicable.
>
> The claims for relief have been carefully reviewed on the basis of information submitted in connection with the claims, and there appears to be no possibility of a constructive average base period net income which would overcome the growth formula and the 80% limitation, in 1944, and result in the allowance of any relief.

As stated in this letter of December 3, 1948, an unused excess profits credit carry-back from 1945 to 1944 had already been allowed by the Commissioner, on the basis of issues other than Section 722. (R. 30.)

On May 7, 1951, the taxpayer, by its attorney, mailed a letter to the Excess Profits Tax Council, as follows (R. 30–31):

> It appears from the record that the applications filed in this proceeding cover only the years 1940–1944, inclusive. Since there was no tax for 1945 no claim was filed for that year.
>
> We should like to ask now that a constructive average base period net income be determined for 1945 for such application in respect of taxes for years prior to 1945 as the taxpayer may be entitled to upon the record.
>
> I believe that such a determination should be made as a matter of course because of the carry-back to 1943 and 1944. See revenue agent's reports respecting standard issues. The carry-back has also been a matter of discussion in conferences with the office of the Internal Revenue Agent in Charge and with the Technical Staff. See letter dated December 3, 1948, from the Internal Revenue Agent in Charge to the taxpayer.
>
> This request is made, nevertheless, for the purpose of making it an express part of the record.

On May 8, 1951, the Excess Profits Tax Council acknowledged receipt of this letter and replied to it as follows (R. 31):

> Receipt is acknowledged of your letter of May 7, 1951, concerning subject applications for section 722 relief. It is noted that this letter requests a determination of constructive average base period net income for 1945.

On the date of this letter, May 7, 1951, the applications for relief involved in this proceeding were pending on the merits before the Excess Profits Tax Council. Several conferences and considerable correspondence with the office of the Commissioner re-

lating to the merits of the case occurred after such date and before the Commissioner's final determination. A settlement of the amount of the constructive average base period net income for all taxable years, including 1945, was agreed to by the taxpayer on July 2, 1952, and the Commissioner's determination of this constructive average base period net income was made on September 19, 1952. (R. 31.)

On January 20, 1954, the taxpayer filed on Form 843 an "Amendment of Claim" relating to its claim for refund of excess profits tax for the year 1944 "solely for the purpose of making formal the claims previously presented requesting use in computing the unused excess profits credit adjustment for 1944, of a constructive average base period net income determined under section 722 for 1943 and 1945. * * *" (R. 31–32.)

The Commissioner, in his determination (R. 12–16), refused to allow the taxpayer the benefit of an unused excess profits credit carry-back based upon a constructive average base period net income under Section 722 from the year 1945 to the year 1944, in determining the taxpayer's excess profits tax liability for the year 1944 (R. 15–16). In his letter, in which he gave formal notice with respect to his partial allowance and partial disallowance of the taxpayer's applications for relief under Section 722 with respect to the taxable years 1940 through 1944, and also gave formal notice of his determination of the excess profits tax liabilities (and income tax liabilities) for those years, the Commissioner (in an accompanying statement) advised (R. 15–16) the taxpayer that a constructive

average base period net income in the amount of $65,000 for the year 1945[5] had been determined "for the purpose only of computing unused excess profits credit * * * carry-back to the extent applicable"—but at the same time he specifically informed the taxpayer that he was holding (R. 16) "that no timely claim for refund has been filed for the purpose of using the constructive average base period net income in the computation of the unused excess profits credit * * * carry-back."

The Tax Court, by an opinion which was reviewed by its "Special Division"[6] (R. 36), upheld the action of the Commissioner with respect to his denial of the unused excess profits credit carry-back from 1945 to 1944 based upon a constructive average base period net income under Section 722 (R. 24–36).

A review of the matter thus presented is sought by the taxpayer before this Court.

SUMMARY OF ARGUMENT

The Tax Court was clearly correct in upholding the Commissioner's refusal to allow the taxpayer, in the determination of its excess profits tax liability for

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[5] In that accompanying statement, the Commissioner also referred to the determination of a constructive average base period net income for 1943 for carry-over purposes (R. 15–16)—a matter no longer material, in view of the Commissioner's concession with respect thereto before the Tax Court (see R. 25–26).

[6] That was in accordance with Section 732 (d) of the Code, which provides that the determination of any Division of the Tax Court on any question arising under Section 722 shall be reviewed by the Special Division of the Tax Court. See, in this connection, *Helms Bakeries* v. *Commissioner*, 236 F. 2d 3 (C. A. 9th).

1944, the benefit of an unused excess profits credit carry-back from 1945 to 1944 based upon relief under Section 722.

The statute, in Section 722 (d), expressly requires that, in order to obtain the benefit of relief under Section 722, a taxpayer must file an application or claim therefor, within the time prescribed by Section 322, "in accordance with regulations prescribed by the Commissioner". The applicable Regulations promulgated pursuant to that express statutory authority unequivocally require, amongst other things, that in order to obtain the benefit of an unused excess profits credit carry-back based upon relief under Section 722, a taxpayer must specifically request such carry-back in an application, claim or amendment filed within the time prescribed by Section 322.

The validity of that requirement of the Regulations, promulgated pursuant to express Congressional authority, is beyond question. That requirement has been uniformly upheld and applied in all cases which have involved this problem.

In the instant case, since the taxpayer has admittedly failed to make any specific request for such carry-back, in any form, in any application, claim or amendment filed within the applicable time, as prescribed in Section 322 (b) (6)—*i. e.,* by March 15, 1949—the Commissioner and the Tax Court were clearly correct in denying the taxpayer the disputed carry-back.

The only occasions on which the taxpayer did make a specific request for the allowance of a carry-back of an unused excess profits credit from 1945 to 1944

based upon relief under Section 722 were in a letter to the Excess Profits Tax Council in 1951 and in its purported "Amendment of Claim" in 1954. Both were obviously too late, as both came long after the taxpayer's time had expired. Under the circumstances, both were clearly ineffective as original claims, because too late, and they were likewise wholly ineffective as purported amendments, since the earlier and timely application and claim, based on specific grounds, were under settled principles not susceptible to amendment by an untimely claim upon a new and different ground.

The taxpayer's assertion that there has been a waiver of the requirements of the Regulations by the Commissioner is wholly unfounded. The facts clearly established that the Commissioner has done nothing which could possibly be regarded as a waiver. On the contrary, this is clearly a case where the Commissioner has stood his ground and insisted upon full compliance with the Regulations.

Clearly, the decision of the Tax Court is correct and should be affirmed. There is, however, at least a serious doubt as to whether this Court has jurisdiction to review the decision of the Tax Court herein, in view of the prohibition contained in Section 732 (c) against appellate review of any question determined "solely by reason of" Section 722—and the Court may, therefore, wish to dismiss for lack of jurisdiction.

ARGUMENT

The Tax Court correctly decided that, in the computation of the taxpayer's excess profits tax liability for 1944, the taxpayer was not entitled to the benefit of an unused excess profits credit carry-back from the year 1945 based upon a constructive average base period net income under Section 722 of the Internal Revenue Code of 1939, where such carry-back was not claimed in a timely application or claim filed by the taxpayer pursuant to the requirements of Section 722 (d) of the Code and of the applicable regulations, Section 35.722-5 of Treasury Regulations 112

A. Preliminary

This is a case involving a tax under the so-called Second World War Excess Profits Tax Law, which was imposed under a new subchapter (Subchapter E—Excess Profits Tax) which was added to Chapter 2 of the 1939 Code by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, entitled "Excess Profits Tax Act of 1940," applicable to taxable years beginning after December 31, 1939, and repealed, as to taxable years beginning after December 31, 1945, by Section 122 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556.

In that new subchapter, a tax was imposed by Section 710 (a) (Appendix, *infra*) upon the "adjusted excess profits net income" as defined in Section 710 (b) (Appendix, *infra*), namely, the "excess profits net income" as defined in Section 711 (Appendix, *infra*) less the following: (1) A specific exemption (originally $5,000, later $10,000); (2) an excess profits credit computed under Section 712 (Appendix,

infra); and (3) an unused excess profits credit adjustment computed in accordance with Section 710 (c) (Appendix, *infra*). Section 711 provided that the excess profits net income shall be the normal tax net income (as defined in Section 13 (a) (2) under Chapter 1 of the Code, relating to the income tax), with certain adjustments. Under Section 712 (a) a corporation (if in existence prior to 1940) could take an excess profits credit computed either under Section 713 (Appendix, *infra*) on the basis of average net income during a so-called "base period," generally the years 1936 through 1939 (i. e., the ABPNI [7]), or under Section 714 upon the basis of invested capital, whichever resulted in the lesser tax. Sections 715 through 720 contained the formula upon which the invested capital credit was to be arrived at.

Then, under the new subchapter, after Section 720 came the sections dealing with "abnormalities" and special situations. Relief for "abnormalities" was accorded primarily by Section 721, which granted relief with respect to "abnormalities" in income in the taxable year (see *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596 (C. A. 9th), certiorari denied, 332 U. S. 767), and by Section 722 (Appendix, *infra*), which granted relief primarily with respect to "abnormalities" in the base period (see *Pohatcong Hosiery Mills* v. *Commissioner,* 162 F. 2d 146 (C. A.

[7] For the sake of brevity and to avoid possible confusion in terminology, the initials "ABPNI" have been generally used to refer to the "average base period net income" under Section 713, and the initials "CABPNI" have been used to refer to the "constructive average base period net income" under Section 722—and we will use those initials in this brief.

2d); *George Kemp Real Estate Co.* v. *Commissioner,* 182 F. 2d 847 (C. A. 2d), certiorari denied, 340 U. S. 852; and *Commissioner* v. *Smith Paper,* 222 F. 2d 126 (C. A. 1st)). In addition, some further relief with respect to "abnormalities" was provided for under Section 711 (b) (1) (H), (I), (J), and (K), by way of adjustments to a taxpayer's base period income, for unusual or "abnormal" deductions, etc., under certain specified and limited conditions, for the purpose of the computation of the excess profits credit based on income. See *Colorado Milling & El. Co.* v. *Commissioner,* 205 F. 2d 551 (C. A. 10th), and *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612 (C. A. 8th). See also Section 732 (a) of the Internal Revenue Code of 1939 (Appendix, *infra*), and Section 35.732–1 of Treasury Regulations 112, as amended by T. D. 5474, 1945 Cum. Bull. 280.

That excess profits tax law has been characterized as one by which "Congress sought to obtain * * * funds from abnormally high corporate profits," to meet the needs of the Government in a period of "national emergency." *United States* v. *Koppers Co.,* 348 U. S. 254, 261. Viewing the law broadly, and overlooking numerous complications not here material, it is apparent that the law taxed at high rates all profits above a certain level, which was called the excess profits credit and which was computed either upon the basis of average income for a specified prior period (called the base period, generally the years 1936 through 1939) or upon the basis of invested capital, whichever resulted in the lesser tax—except that the law contained provisions granting re-

lief from the resultant tax for certain so-called "abnormalities," primarily by Sections 721 and 722, and to some further extent under certain parts of Section 711 (b) (1), and the law also contained various other provisions dealing with special situations.

The principal so-called "abnormalities" provisions of the Second World War Excess Profits Tax Law (Section 721 and Section 722) were originally added to the Code by the Second Revenue Act of 1940, but they underwent considerable major changes in subsequent Acts, being largely amplified by the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and by the Revenue Act of 1942, c. 619, 56 Stat. 798, with further occasional changes being made even thereafter. Section 722, with respect to its *relief* provisions, was finally changed (retroactively, to apply to all taxable years after 1939) by Section 222 of the Revenue Act of 1942, so as to provide, in substance, that a taxpayer could under certain conditions obtain relief upon the basis of a "constructive" average base period net income (i. e., a "CABPNI") if it could establish that its income during the base period was not normal for any of the reasons specified in the statute and if it could establish "what would be a fair and just amount representing normal earnings." With respect to the *procedure* for obtaining relief, Section 722 was finally amended by the Act of December 17, 1943, c. 346, 57 Stat. 601 (also retroactively to apply to all taxable years after 1939), so as to require, in substance, that a taxpayer must first pay its excess profits tax without the benefit of Section 722 and then seek relief under Section 722 by filing

a claim therefor pursuant to the provisions of Section 322 of the Code (Appendix, *infra*), the so-called "claim for refund" section, "in accordance with regulations prescribed by the Commissioner with the approval of the Secretary." Section 722 (d) of the Code. See also *Pohatcong Hosiery Mills* v. *Commissioner, supra; United States* v. *Koppers Co., supra; May Seed & Nursery Co.* v. *Commissioner,* 242 F. 2d 151 (C. A. 8th).[8]

At the same time that Congress undertook the first major amplification of the two principal "abnormalities" sections (Sections 721 and 722) and added Section 711 (b) (1) (J) and (K) in the Excess Profits Tax Amendments of 1941, it also added to the law Section 732 (a), (b), and (c) (Appendix, *infra*) to deal specifically with the review of "abnormalities" questions by the Tax Court (then called the Board of Tax Appeals) and to prohibit expressly the further review by any other court of any decision of the Tax Court on any of the "abnormalities" questions. By subsection (a) of Section 732, Congress provided for the review by the Tax Court of the disallowance by the Commissioner of a claim for refund upon the basis of the "abnormalities" provisions of the law, namely parts of Section 711 (b), and Section 721 and Section 722.[9] By subsection (b) of Section 732, Con-

[8] There was a provision, in Section 710 (a) (5), for the deferral of the payment of a portion of the tax where Section 722 relief was sought, but that is not material here and may be ignored for present purposes.

[9] Theretofore, the jurisdiction of the Tax Court could be invoked only where the Commissioner had determined a deficiency, pursuant to Section 272 of the Code.

gress authorized the Tax Court to determine a deficiency with respect to any taxable year brought to it upon a disallowance of a claim for refund in accordance with subsection (a). See *Commissioner* v. *Blue Diamond Coal Co.,* 230 F. 2d 312 (C. A. 6th); *Commissioner* v. *Pittsburgh & Weirton B. Co.,* 219 F. 2d 259 (C. A. 4th); *Commissioner* v. *S. Frieder & Sons Co.,* 228 F. 2d 478 (C. A. 3d); *Commissioner* v. *Seminole Mfg. Co.,* 233 F. 2d 395 (C. A. 5th.) By subsection (c) of Section 732, Congress limited the review of those "abnormalities" questions to the Tax Court, expressly prohibiting any further review by any other court or agency of the decision of the Tax Court on any of those "abnormalities" questions. The intent of Congress to so limit the review of "abnormalities questions" was made unmistakably clear by its Committee Reports. H. Rep. No. 146, 77th Cong., 1st Sess., pp. 14–15 (1941–1 Cum. Bull. 550, 560–561), and S. Rep. No. 75, 77th Cong., 1st Sess., pp. 15–16 (1941–1 Cum. Bull. 564).

Subsequently, by Section 222 (c) of the Revenue Act of 1942, Congress added subsection (d) to Section 732 of the Code (Appendix, *infra*) to provide for the review by a "Special Division" of the Tax Court of the decisions by any division of the Tax Court of questions under Section 721 (a) (2) (C) or Section 722 of the Code. This new feature was written into the law by Congress because of its realization of the "complicated nature" of the problems and issues involved. See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 149 (1942–2 Cum. Bull. 372, 482); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 206–207 (1942–2 Cum.

Bull. 504, 655). In the new subsection (d) of Section 732, Congress further provided that the decisions on questions under Section 721 (a) (2) (C) or Section 722 by the newly created Special Division of the Tax Court shall be the decisions of the Tax Court and shall not be reviewable by the entire Tax Court.[10] See Section 35.732–1 of Treasury Regulations 112, as amended by T. D. 5474, 1945 Cum. Bull. 280; see also *Green Spring Dairy* v. *Commissioner,* 208 F. 2d 471 (C. A. 4th); *A. B. Frank Co.* v. *Commissioner,* 211 F. 2d 497 (C. A. 5th); *Helms Bakeries* v. *Commissioner,* 236 F. 2d 3 (C. A. 9th.)

Returning to the instant case, it might be observed at this point that the provision of the law which gave rise to the present controversy is the provision contained in Section 710 (b) (3), which permitted the making of an adjustment, in accordance with Section 710 (c), for "unused" excess profits credits in arriving at the income to be subjected to the excess profits tax. Originally, Section 710 (c), as it was first added to the Code by the Second Revenue Act of 1940, permitted only the carryover to a taxable year of any portion of the excess profits credit unused in the preceding year—i. e., permitted the carry-over from the preceding year to the taxable year of any portion of the excess profits credit for the prior year which was in excess of the excess profits net income of that prior year. By Section 2 of the Excess Profits Tax

[10] Nor, of course, are the decisions of such questions by the Special Division reviewable by any other court or agency, in view of the prohibition contained in Section 732 (c) of the Code.

Amendments of 1941, the provision was changed so as to allow the carry-over to the taxable year of unused credits to be made from the two preceding taxable years. After a minor change made by Section 202 (e) of the Revenue Act of 1941, the provision was drastically changed by Section 204 (a) and (b) of the Revenue Act of 1942, so as to permit adjustments to be made in the taxable year by way of carry-back of unused credits from the two subsequent taxable years, in addition to the carry-over of unused credits from the two preceding taxable years.

Upon a re-examination of the carry-back provisions in 1945, Congress by Section 5 of the Tax Adjustment Act of 1945 enacted provisions prescribing special periods of limitations for the allowance of refunds (or the assessment of resultant deficiencies) resulting from the application of carry-backs of unused excess profits credits (and of net operating losses). Congress did that because it realized that of necessity the facts or events giving rise to overpayments (or resultant deficiencies) in excess profits tax attributable to carry-backs of unused excess profits credits would not occur until long after the close of the taxable year, so as to make the existing normal limitations provisions inadequate. See H. Rep. No. 849, 79th Cong., 1st Sess., pp. 28–33 (1945 Cum. Bull. 566, 585–588), and S. Rep. No. 458, 79th Cong., 1st Sess., p. 3 (1945 Cum. Bull. 592, 593–594). The provisions prescribing the new limitations periods as to refunds, and resultant deficiencies, were enacted by Congress as retroactive changes to Section 322 and Section 276 under Chapter 1, the income tax chapter of the Code—

which by virtue of Section 729 (a) (Appendix, *infra*) were applicable to the excess profits tax law under Subchapter E of Chapter 2 of the Code. Still later, by Section 122 (e) and (f) of the Revenue Act of 1945, Congress further amended the pertinent limitations provisions applicable to carry-backs of unused excess profits credits, in order to coordinate them to the repeal of the excess profits tax law effective for taxable years beginning after 1945 by Section 122 (a) of the Revenue Act of 1945. See S. Rep. No. 655, 79th Cong., 1st Sess., pp. 30–32 (1945 Cum. Bull. 621, 645–646), and H. Conference Rep. No. 1165, 79th Cong., 1st Sess., p. 7 (1945 Cum. Bull. 654, 655).

The normal period of limitations for the filing of a claim for refund, under subsection (b) (1) of Section 322 (Appendix, *infra*), was two years from the payment of the tax or three years from the filing of the return, whichever expired later. The three-year period from the filing of the return was, of course, measured from the year of the claimed overpayment, so that in a case where a refund would be sought upon the basis of the carry-back of an unused excess profits credit, the three-year period for the filing of claims would run from the filing date of the return for the year to which the unused excess profits credit was sought to be applied.

In lieu of that period prescribed in subsection (b) (1), however, subsection (b) (6) of Section 322 (Appendix, *infra*) interposed a special provision applicable to refunds attributable to carry-backs and prescribed a longer period of limitations. It was, as simply but clearly indicated by its title, a provision

enacting a "Special period of limitation with respect to * * * unused excess profits credit carry-backs." As subsection (b) (6) was first added to the Code by Section 5 (b) of the Tax Adjustment Act of 1945, it prescribed, as a first alternative, a three-year period measured from the close of the taxable year giving rise to the unused excess profits credit. This was later changed, by the amendment made by Section 122 (e) (1) of the Revenue Act of 1945, so as to prescribe as the first alternative a period ending with the expiration of the fifteenth day of the thirty-ninth month following the end of the taxable year giving rise to the unused excess profits credit. As the second alternative, subsection (b) (6) prescribed a period of limitations equal to the period prescribed in Section 322 (b) (3) (Appendix, *infra*)—which, in substance, in the case where the Commissioner and the taxpayer had executed an agreement to extend the time for assessment, authorized the filing of a claim for refund within the period as extended by the agreement and for six months thereafter. See *Claremont Waste Mfg. Co.* v. *Commissioner,* 238 F 2d 741 (C. A. 1st). We might observe at this point that this second alternative under Section 322 (b) (6) does not apply in the instant case, since here there was no agreement (R. 29) entered into by the taxpayer and the Commissioner to extend the time for the year 1945—or for the year 1944.

B. The carry-back of an unused excess profits credit based upon relief under Section 722 must, as required by the Regulations, be specifically requested in a timely application for relief, claim or amendment thereto—and, since no such timely request was made here, the carry-back was properly denied

In this case, the Tax Court, upholding the action of the Commissioner, held that the taxpayer was not entitled to the benefit of an unused excess profits credit carry-back to the year 1944 from the year 1945 based upon a CABPNI under Section 722 for the year 1945, because the taxpayer had failed to claim such carry-back in any timely application for relief or claim for refund, or amendment thereto.

We submit that the holding of the Tax Court is unquestionably correct under the facts of this case, and must therefore be affirmed. Indeed, it may well be said here, we believe, that the taxpayer's eventual request, belatedly made, for the carry-back to 1944 of an unused excess profits credit from 1945 under Section 722 "was properly rejected by the Commissioner if it did not satisfy the conditions which Congress directly and through the rule-making power given to the Treasury laid down as a prerequisite for such refund." *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293, 295–296.

As already noted, the *procedural* provisions with respect to Section 722 relief were finally amended—by the Act of December 17, 1943, c. 346, 57 Stat. 601, retroactively so as to apply to all taxable years beginning after December 31, 1939—so as to provide

that a taxpayer must first pay its excess profits tax and then seek relief under Section 722 by way of a claim for refund, by an application therefor "in accordance with regulations prescribed by the Commissioner" (Section 722 (d)). In other words, the final mandate of Congress on this matter was that no relief should be allowed to a taxpayer under Section 722 except by way of refund and upon an application therefor made according to the Regulations to be prescribed by the Commissioner. As is readily apparent from the reports of the congressional committees heretofore referred to, Congress by that time was fully aware of the great complexities and difficulties involved in the subject matter of the relief granted under Section 722, and undoubtedly because of that chose to leave all administrative and procedural details to be worked out by the Commissioner by regulation. See *May Seed and Nursery Co.* v. *Commissioner,* 242 F. 2d 151 (C. A. 8th).

It is, we believe, readily understandable that Congress would leave to the Commissioner the details for the administration of a matter as complicated as Section 722. See *May Seed and Nursery Co.* v. *Commissioner, supra;* see also *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612, 615 (C. A. 8th). Cf. *Angelus Milling Co.* v. *Commissioner, supra,* p. 296. And, it is settled, when Congress does leave details to be worked out by the Commissioner, the Regulations which are promulgated pursuant to such express legislative authority have the full force of law (*Security-First Nat. Bank of Los Angeles* v. *Welch,* 92 F. 2d 357, 395 (C. A. 9th), certiorari denied, 303 U. S. 638), and

should not be disregarded unless clearly contrary to the will of Congress (*Commissioner* v. *South Texas Co.,* 333 U. S. 496). See also *Angelus Milling Co.* v. *Commissioner, supra; May Seed and Nursery Co.* v. *Commissioner, supra.*

We believe that an examination of the pertinent provisions of the Regulations promulgated by the Commissioner, with the approval of the Secretary of the Treasury, leaves no room for any doubt as to the correct result in the instant case. It will be noted that Section 35.722–5 (a) of Treasury Regulations 112 (Appendix, *infra*) requires, in the first place, that in order to obtain the benefits of Section 722 a taxpayer must file an application on a designated form (Form 991) within the period prescribed by Section 322 for the filing of claims for refund, which application "must set forth in detail and under oath each ground under section 722 upon which the claim for relief is based, and facts sufficient to apprise the Commissioner of the exact basis thereof." That section further points out that it is "incumbent upon the taxpayer to prepare a true and complete claim and to substantiate it by clear and convincing evidence," and gives warning that a "failure to do so will result in the disallowance of the claim." The section also provides that no "new grounds" will be considered if presented by the taxpayer after the period prescribed by Section 322.

With particular reference to the allowance of unused excess profits credit carry-backs resulting from relief under Section 722, the Regulations, in the same section, specifically require that a taxpayer must,

within the time prescribed by Section 322, file an application (on Form 991) for the taxable year to which the unused excess profits credit carry-back is to be applied, which application "shall contain," in addition to all other information required, "a complete statement of the facts upon which it is based * * * and shall claim the benefit of the unused excess profits credit * * *" carry-back." The Regulations further provide, still in the same section, that if an application for relief for the particular year has already been filed, the taxpayer, in order to obtain the benefit of an unused excess profits credit carry-back based upon a CABPNI, should, within the time prescribed by Section 322, file an amendment to that application for the taxable year to which the unused excess profits credit carry-back is to be applied, specifically requesting such carry-back.

From a mere reading of the Regulations, it is readily apparent that the benefit of the carry-back of an unused excess profits credit resulting from a CABPNI under Section 722 must be specifically sought by a taxpayer in a timely application for relief, timely claim for refund, or timely amendment thereto. Indeed, that requirement is prescribed and outlined in detail by the Regulations with such care and particularity as to leave no room for any possible doubt about the matter.

Upon the basis of that requirement of the Regulations, all of the cases which have had occasion to consider this problem as to the allowance of an unused excess profits credit carry-back, or carry-over, resulting from the allowance of a CABPNI and the

grant of relief under Section 722, have denied the carry-back, or carry-over, where no timely claim was made specifically requesting such carry-back, or carry-over. *May Seed and Nursery Co.* v. *Commissioner, supra,* affirming 24 T. C. 1131. *Lockhart Creamery* v. *Commissioner,* 17 T. C. 1123, 1140–1143; *Barry-Wehmiller Machinery Co.* v. *Commissioner,* 20 T. C. 705; and *St. Louis Amusement Co.* v. *Commissioner,* 22 T. C. 522. Cf. *Packer Publishing Co.* v. *Commissioner,* 17 T. C. 882, 898, reversed on other issues, 211 F. 2d 612 (C. A. 8th), in which the carry-over of an unused constructive excess profits credit was allowed because a computation showing the use of the carry-over in the application was regarded (p. 898) by the Tax Court as constituting a sufficient statement of a claim for the carry-over.

All of the decisions of the Tax Court on this problem in the cases above-mentioned, and particularly in the *Lockhart Creamery, Barry-Wehmiller Machinery Co.,* and *St. Louis Amusement Co.* cases, constitute at least an implicit recognition of the validity and force of these provisions of the Regulations, which, as seen, were promulgated pursuant to express statutory authority. Further, the Eighth Circuit, in the *May Seed and Nursery Co.* case, has given express and emphatic approval to this provision of the Regulations requiring that a specific request for a carry-back, or carry-over, of an unused credit resulting from a CABPNI under Section 722 must be made in a timely application, claim, or amendment thereto.

Under the circumstances, and especially in view of the complicated nature of the subject matter in-

volved, it seems to us inconceivable that any court would hold these Regulations invalid. Because of the complexity of the problems and difficulties which could reasonably have been expected to arise in the administration of Section 722 relief, it would seem that there could be no serious challenge to the appropriateness of the Regulations promulgated by the Commissioner. See *May Seed and Nursery Co.* v. *Commissioner, supra,* at pp. 153–154. See also *Lockhart Creamery* v. *Commissioner, supra,* at p. 1141; *Angelus Milling Co.* v. *Commissioner, supra,* at p. 296; and *Blum Folding Paper Box Co.* v. *Commissioner,* 4 T. C. 795, 796–797, 799.

In the instant case, it is clear from the facts that the taxpayer has failed to make a *timely* application, claim or demand, in any form whatsoever, specifically requesting the carry-back of an unused excess profits credit from 1945 to 1944 based upon a CABPNI under Section 722, in compliance with the Regulations. In accordance with the first alternative of Section 322 (b) (6), applicable here, the period for claiming a refund of 1944 excess profits tax based upon a carry-back of an unused excess profits credit from 1945, expired on the fifteenth day of the thirty-ninth month after the close of the year 1945—i. e., it expired on March 15, 1949. That date fixed the time limit, therefore, within which the taxpayer should have made its demand—either in an application for relief, claim for refund, or amendment thereto—specifically requesting the allowance of a carry-back of an unused excess profits credit from 1945 to 1944 upon the basis of the grant of relief under Section 722 and the allowance of a CABPNI.

That was the unequivocal requirement of the Regulations and of the statute. But the taxpayer failed completely to comply with that requirement, as it filed no such claim or demand, *in any form,* before the expiration of the applicable period. Both the taxpayer's original application for relief (on Form 991), filed on May 15, 1945 (R. 27), and its claim for relief (on Form 843), filed on February 28, 1949 (R. 28–29), failed to assert any claim or demand whatsoever for any carry-back of an unused credit from 1945 to 1944—either upon the basis of Section 722 relief, or under the normal provisions of the law, i. e., before or without the benefit of any relief under Section 722 (R. 29.)

The first request which the taxpayer ever made for the carry-back of an unused excess profits credit from 1945 to 1944 upon the basis of a CABPNI under Section 722 came in the form of the letter which the taxpayer wrote to the Excess Profits Tax Council on May 7, 1951—which was obviously too late, since, as we have seen, its time had already expired on March 15, 1949. Likewise, the so-called "Amendment of Claim," which the taxpayer filed (on Form 843) on January 20, 1954 (R. 31–32), also came too late. Thus, the Tax Court was unquestionably correct in regarding both the 1951 letter and the 1954 so-called amendment as untimely and consequently ineffective. (R. 32–33.)

Not only were the 1951 letter and 1954 amendment ineffective as original claims, because filed too late, but they were also completely ineffective as amendments of the prior application and claim which had

been timely filed by the taxpayer for relief and refund on specific grounds under Section 722. It has long been settled that a timely claim for refund upon a specific ground, and for a definite amount, is not susceptible to amendment by an untimely claim upon a different and unrelated ground. *United States* v. *Andrews,* 302 U. S. 517, and *United States* v. *Garbett Oil Co.,* 302 U. S. 528.

Although the taxpayer at times asserts (Br. 10, 12, 14) that it has complied with the requirements of the Regulations, it does concede (Br. 10–11, 15–16) that it has not made a timely specific request for the allowance of a carry-back of unused excess profits credit from 1945 to 1944 based upon a CABPNI under Section 722. In an effort to escape the consequences of that concession, however, the taxpayer suggests (Br. 11, 15–16) that the Regulations do not require that a specific request for a carry-back based upon a CABPNI must be made. We submit that in that respect the taxpayer is completely in error, because it is unmistakably clear that the Regulations, as already brought out, do require that such a carry-back be specifically requested. See *May Seed and Nursery Co.* v. *Commissioner,* 242 F. 2d 151 (C. A. 8th).

In final analysis, however, the real substance of all of the taxpayer's contentions—including its reliance upon the fact that the Commissioner had granted a carry-back of an unused excess profits credit from 1945 to 1944 under the normal provisions of the law, and its reliance upon the 1951 letter and the 1954 so-called amendment—is premised upon nothing more than an assertion that the Commissioner

has somehow waived the requirements of the Regulations. In support of that assertion, the taxpayer makes a variety of arguments and cites numerous authorities. (Br. 18–23.) In view of the facts of this case, we deem it unnecessary to burden this Court with any detailed discussion thereof. We firmly believe that the taxpayer's basic assertion of a waiver in this case is wholly without merit. Clearly, this is not a case in which it could possibly be said that the Commissioner by his conduct might be regarded as having waived strict compliance with the Regulations. Cf. *Angelus Milling Co.* v. *Commissioner, supra,* at pp. 296–299. On the contrary, on the facts of this case, we believe that it may well be said here that this is a case where the Commissioner has stood his ground—where the Commissioner "insists upon full compliance" with the Regulations. See *May Seed and Nursery Co.* v. *Commissioner, supra,* at p. 155.

In the instant case, the Commissioner has never done anything which could possibly be regarded as a waiver of the requirement of the Regulations that a specific demand must be made for the carry-back of an unused excess profits credit based upon a CABPNI under Section 722. Contrary to the taxpayer's contention (Br. 7), no such waiver can be inferred from the action of the Commissioner in allowing the carry-back of an unused excess profits credit from 1945 to 1944 resulting under the normal provisions of the law. The making of an adjustment for the carry-back of an unused credit resulting under the normal provisions of the law, i. e.,

without the benefit of Section 722 relief, is clearly required under Section 710 (c) and, in fact, that adjustment is made automatically, whether or not claimed—that adjustment has even been characterized as mandatory. (See *May Seed and Nursery Co.* v. *Commissioner, supra.* Cf. Taxpayer's Br. 17.) As distinguished from the carry-back of an unused credit resulting under the normal provisions of the law, however, the carry-back involved in the instant case is the carry-back of an unused excess profits credit which arises and results solely and exclusively from the grant of relief under Section 722. As to this latter type of carry-back, we submit, the Regulations inescapably require that a specific demand therefor must be made by the taxpayer in a timely application, claim or amendment thereto. And, clearly, the Commissioner has never waived that requirement in this case.

Because of this difference between the two types of carry-backs, in that a specific demand must be made for the carry-back of an unused credit resulting from Section 722 relief, the fact that the Commissioner has allowed a carry-back of unused excess profits credit from 1945 to 1944 under the normal provisions of the law, as indicated, is wholly immaterial and of no significance whatever in the present controversy—and does not aid the taxpayer in its present contention before this Court for a carry-back of unused credit resulting from the grant of a CABPNI under Section 722. See *Lockhart Creamery* v. *Commissioner, supra; Barry-Wehmiller Machinery Co.* v. *Commissioner, supra;* and *St. Louis Amuse-*

ment Co. v. *Commissioner, supra.* Nor is the taxpayer's position here aided by such cases as the decision in the second *Kemp* case, *George Kemp Real Estate Co.* v. *Commissioner,* 205 F. 2d 236 (C. A. 2d), cited by the taxpayer (Br. 14), since such cases merely stand for the proposition that once a taxpayer has litigated, to a final decision in a prior case, its right to Section 722 relief, it will not be permitted to litigate again the same question for a later year, under the doctrine of collateral estoppel.

Nor is the taxpayer's position aided by the fact that a CABPNI under Section 722 has actually been allowed by the Commissioner for the year 1945. The allowance of a CABPNI for that year, and for 1943, was made specifically "for the purpose only of computing unused excess profits credit carry-over and carry-back to the extent applicable." (R. 15–16.) That action by the Commissioner cannot possibly be regarded as constituting a waiver of the requirement of the Regulations. *Wiener Machinery Co.* v. *Commissioner,* 16 T. C. 48, 52–53; *Barry-Wehmiller Machinery Co.* v. *Commissioner, supra,* at p. 714. And, it must be remembered, the Commissioner, in that same statement, which accompanied the ninety-day letter upon which the instant proceeding is based, advised the taxpayer specifically and unmistakably that he was holding that no timely claim had been made for a carry-back based on a CABPNI (R. 16), and he consequently denied the carry-back.

We might also point out that, contrary to the taxpayer's suggestion (Br. 9), the concession with respect to the year 1943 which the Commissioner made

before the Tax Court (R. 25–26) was *not* in any sense the equivalent of a consent to the use of an unused excess profits credit based upon a CABPNI under Section 722 for the purpose of arriving at the disputed carry-back to 1944. Actually, the Commissioner before the Tax Court consented to the use of a CABPNI for 1943 merely for the purpose of determining the amount of unused excess profits credit arising under the normal provisions of the law for the year 1945 which would be used up in the year 1943, and so as to thus arrive at the amount of unused remainder of that "normal" 1945 credit which would be available to be applied to the year 1944.

For the foregoing reasons, we firmly believe that the decision of the Tax Court in this case is correct and should be affirmed. We might, however, add one additional comment, and that is to point out that in the decision of this controversy it should be remembered that Section 722 is a provision granting special relief, and that such provisions are to be strictly construed against the one claiming rights or benefits thereunder. See *Helvering* v. *Inter-Mountain Life Insurance Co.,* 294 U. S. 686; *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46; *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612 (C. A. 8th).

The jurisdiction of this Court to review

As indicated at the beginning of this brief, we believe that there is a serious doubt as to this Court's jurisdiction to review the decision of the Tax Court herein, because of the prohibition against appellate review contained in Section 732 (c) of the Code. Un-

mistakably, Section 732 (c) prohibits any appellate review of any decision of the Tax Court of any question determined "solely by reason of * * * section 722"—or by reason of the other two so-called "abnormalities" provisions of the law, Section 721 or parts of Section 711 (b) (1).

That prohibition against review has been generally observed by the appellate courts, with respect to all three of the "abnormalities" sections. See *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596 (C. A. 9th), certiorari denied, 332 U. S. 767; *Colonial Amusement Co. of Philadelphia* v. *Commissioner,* 173 F. 2d 568 (C. A. 3d); *George Kemp Real Estate Co.* v. *Commissioner,* 182 F. 2d 847 (C. A. 2d), certiorari denied, 340 U. S. 852; *Colorado Milling & El. Co.* v. *Commissioner,* 205 F. 2d 551 (C. A. 10th); *A. B. Frank Co.* v. *Commissioner,* 211 F. 2d 497 (C. A. 5th); *Corn Products Refining Co.* v. *Commissioner,* 215 F. 2d 513 (C. A. 2d), certiorari denied on this point, 348 U. S. 911, affirmed on other issues, 350 U. S. 46, rehearing denied, 350 U. S. 943; also cf. *George Kemp Real Estate Co.* v. *Commissioner,* 205 F. 2d 236 (C. A. 2d); *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612 (C. A. 8th); *Helms Bakeries* v. *Commissioner,* 236 F. 2d 3 (C. A. 9th); and *May Seed and Nursery Co.* v. *Commissioner,* 242 F. 2d 151 (C. A. 8th).

In the instant proceeding, there is substantial warrant for the view that the question decided by the Tax Court was one determined "solely by reason of" Section 722, and that hence appellate review is prohibited by Section 732 (c). The issue, in general, was one involving the requirement, prescribed by

Section 722 itself, of the filing of an application for relief under Section 722. Viewed more directly, the issue decided by the Tax Court was one as to the sufficiency of an application for relief under Section 722. Even more specifically, the issue was whether an unused excess profits credit carry-back under Section 722 may be allowed when not claimed by the taxpayer, as required by the Regulations under Section 722. When so viewed, the issue would appear to be one falling within the prohibition against appellate review contained in Section 732 (c).[11]

The taxpayer before this Court takes the position (Br. 2) that the Court has jurisdiction to review this case, notwithstanding the prohibition of Section 732 (c), because the question is one "dependent upon section 322." That might be a permissible view, though we would be inclined to disagree. Another permissible view in favor of appellate jurisdiction might perhaps be the one adopted by the Eighth Circuit in the *May Seed and Nursery Co.* case (240 F. 2d, at p. 155), to the effect that the issue in this type of case is not one determined "necessarily solely by reason of § 722 of the Code" because the underlying questions are as to "whether § 710 is controlling of

[11] In this connection, it may be noted that the Tax Court itself apparently has been considering such issues as issues arising under Section 722, and has caused them to be reviewed by the Special Division pursuant to Section 732 (d). See R. 36. See also *May Seed and Nursery Co.* v. *Commissioner*, *supra*; *Lockhart Creamery* v. *Commissioner*, *supra*; *Barry-Wehmiller Machinery Co.* v. *Commissioner*, *supra*; *St. Louis Amusement Co.* v. *Commissioner*, *supra*; and *Central Outdoor Advertising Co.* v. *Commissioner*, 22 T. C. 549.

the situation" and "whether the regulations * * * are * * * valid."

Under the circumstances, we have not made a direct challenge to the jurisdiction of this Court, or moved to dismiss for lack of jurisdiction—as we have done in other cases. We have refrained from doing so deliberately, primarily because of a desire on our part to be fair and to avoid the appearance of pressing what might be regarded as a hypertechnical position so as to deprive a litigant unfairly of his opportunity to be heard.

We frankly concede that we do not see the point as one free from doubt, but, while we have not moved to dismiss, we have nevertheless felt constrained to call the problem to the attention of the Court, with nothing more than a suggestion that there is at least a serious doubt as to whether this Court has jurisdiction to review the instant case.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be affirmed.

However, there is, as suggested, a question as to the jurisdiction of this Court to review the decision of the Tax Court, and this Court may wish to dismiss for lack of jurisdiction.

Respectfully submitted.

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JUNE 1957.

APPENDIX

Internal Revenue Code of 1939:

Chapter 1—Income Tax

* * * * *

Sec. 322. Refunds and credits.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on Allowance.*

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) [as amended by Section 169 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

* * * * *

(3) [as added by Section 169 (a) of the Revenue Act of 1942, *supra*] *Exceptions in the case of Waivers.*—If both the Commissioner and the taxpayer have, within the period prescribed in paragraph (1) for the filing of a claim for credit or refund, agreed in writing under the provisions of section 276 (b) to extend beyond the period prescribed in section 275 the time within which the Commissioner may make an assessment, the period within which a claim for credit or refund may be filed, or credit or refund allowed or made if no claim is filed, shall be the period within which the Commissioner may make an assessment pursuant to such agreement or any extension thereof, and six months thereafter, except that the provisions of paragraph (1) shall apply to any claim filed, or credit or refund allowed or made, before the execution of such agreement. * * *

* * * * *

(6) [as added by Section 5 (b) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517, and as amended by Section 122 (e) (1) of the Revenue Act of 1945, c. 453, 59 Stat. 556] [12] *Special period of limitation with respect to net operating loss carry-backs and unused excess profits credit carry-backs.*—If the claim for credit or refund relates to an overpayment attributable to a net operating loss carry-back or to an unused excess profits credit carry-back, in lieu of the three-year period of limitation prescribed in paragraph (1), the period shall be that period which ends with the expiration of the fifteenth day of the thirty-ninth month following the end of the taxable year of the net operating loss or the unused excess profits credit which results in such carry-back, or the

[12] By section 5 (f) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517, and Section 122 (e) (2) of the Revenue Act of 1945, c. 453, 59 Stat. 556, made applicable with respect to the taxable years beginning after 1940.

period prescribed in paragraph (3) in respect of such taxable year, whichever expires later. In the case of such a claim, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in paragraph (2) or (3), whichever is applicable, to the extent of the amount of the overpayment attributable to such carry-back.

* * * * *

(26 U. S. C. 1952 ed., Sec. 322.)

CHAPTER 2—ADDITIONAL INCOME TAXES

* * * * *

SUBCHAPTER E—EXCESS PROFITS TAX

[As added by Section 201 of the Revenue Act of 1940, c. 757, 54 Stat. 974, which provided that the new subchapter may be cited as the "Excess Profits Tax Act of 1940".]

SEC. 710. IMPOSITION OF TAX.

(a) [as amended by Section 201 of the Second Revenue Act of 1941, c. 412, 55 Stat. 687, and Section 202 of the Revenue Act of 1942, *supra*] *Imposition.*—

(1) *General rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever is the lesser:

* * * * *

(b) [as amended by Section 2 (a) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, by Section 204 (a) of the Revenue Act of 1942, *supra,* and Section 204 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any tax-

able year means the excess profits net income (as defined in section 711) minus the sum of:

(1) *Specific exemption.*—A specific exemption of $10,000; * * *

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under Section 712; and

(3) *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(c) [as amended by Section 204 (b) of the Revenue Act of 1942, *supra*] *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of unused excess profits credit.*—The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. * * *

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i)

by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in subsection (b) (1).

* * * * *

(26 U. S. C. 1952 ed., Sec. 710.)

SEC. 711. EXCESS PROFITS NET INCOME.

(a) *Taxable Years Beginning After December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year except that the following adjustments shall be made:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

(2) *Excess profits credit computed under invested capital credit.*—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

* * * * *

(26 U. S. C. 1952 ed., Sec. 711.)

SEC. 712 [as amended by Section 13 of the Excess Profits Tax Amendments of 1941, *supra*]. EXCESS PROFITS CREDIT—ALLOWANCE.

(a) *Domestic Corporations.*—In the case of a domestic corporation which was in existence before January 1, 1940, the excess profits credit for any taxable year shall be an amount computed under section 713 or section 714, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 712.)

SEC. 713 [as amended by Section 4 of the Excess Profits Tax Amendments of 1941, *supra,* and Section 288 (e) (2) of the Revenue Act of 1942, *supra*]. EXCESS PROFITS CREDIT—BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations.*—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income.

* * * * *

(b) *Base Period.*—

(1) *Definition.*—As used in this section the term "base period"—

(A) If the corporation was in existence during the whole of the forty-eight months preceding the beginning of its first taxable year under this subchapter, means the period commencing with the beginning of its first taxable year beginning after December 31, 1935, and ending with the close of its last taxable year beginning before January 1, 1940; and

* * * * *

(26 U. S. C. 1953 ed., Sec. 713.)

SEC. 722 [as amended by Section 222 of the Revenue Act of 1942, *supra,* and the Act of December 17, 1943, c. 346, 57 Stat. 601]. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earn-

ings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income otherwise determined under this subchapter. * * *

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

* * * * *

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * *

* * * * *

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for

the purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * *

(26 U. S. C. 1952 ed., Sec. 722.)

SEC. 728. MEANING OF TERMS USED.

The terms used in this subchapter shall have the same meaning as when used in Chapter 1.

(26 U. S. C. 1952 ed., Sec. 728.)

SEC. 729. LAWS APPLICABLE.

(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

* * * * *

(26 U. S. C. 1952 ed., Sec. 729.)

SEC. 732 [as added by Section 9 of the Excess Profits Tax Amendments of 1941, *supra,* and as amended by Section 222 (c) of the Revenue Act of 1942, *supra;* Section 2 of the Joint Resolution of June 30, 1945, c. 211, 59 Stat. 295; and by Section 203 (a) of the Act of December 29, 1945, c. 652, 59 Stat. 669]. REVIEW OF ABNORMALITIES BY THE TAX COURT OF THE UNITED STATES.

(a) *Petition to Tax Court.*—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, relating to abnormalities the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court for a redetermination of the tax under this sub-

chapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

(b) *Deficiency Found by the Tax Court in Case of Claim.*—If the Tax Court finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a) and the Tax Court further finds that there is a deficiency for such year, the Tax Court shall have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Tax Court becomes final, be assessed and shall be paid upon notice and demand from the collector.

(c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721 or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

(d) *Review by Special Division of the Tax Court.*—The determinations and redeterminations by any division of the Tax Court involving any question arising under section 721 (a) (2) (C) or section 722 with respect to any taxable year shall be reviewed by a special division of the Tax Court which shall be constituted by the presiding judge and consist of not less than three judges of the Tax Court. The decisions of such special division shall not be reviewable by the Tax Court, and shall be deemed decisions of the Tax Court.

(26 U. S. C. 1952 ed., Sec. 732.)

Treasury Regulations 112, promulgated under the Internal Revenue Code of 1939, relating to the ex-

cess profits tax for taxable years beginning after December 31, 1941:

SEC. 35.722–5 [as amended by T. D. 5393, 1944 Cum. Bull. 415, and T. D. 5483, 1945 Cum. Bull. 277]. *Application for Relief Under Section 722.*—(a) *Requirements for filing.*—Except as provided in section 710 (a) (5) and section 35.710–5 (relating to deferment of payment of excess profits tax in certain cases under section 722) and except as provided in (d) of this section, the taxpayer is not permitted to claim the benefits of section 722 in computing its excess profits tax, file its excess profits tax return, and pay the tax thus shown on such return without regard to the provisions of section 722. To obtain the benefits of section 722 for any taxable year, the taxpayer must, within the period of time for filing a claim for credit or refund and subject to the limitation as to amount of credit or refund prescribed by section 322 as applicable to the taxable year for which relief is claimed, file under oath an application on Form 991 (revised January 1943) for the benefits of section 722, unless the taxpayer has deferred on its return a portion of its excess profits tax under section 710 (a) (5), or unless the provisions of (d) of this section are applicable to the taxpayer. Generally, an application for relief under section 722 must be filed for an excess profits tax taxable year within three years from the time the excess profits tax return for such year was filed, or within two years from the time the tax for such year was paid, whichever is the later. See section 322 and the regulations thereunder, however, as to the specific rules relating to the period of limitation upon the filing of claims for credit or refund, and the limitations upon the amount of credit or refund.

If an application for relief on Form 991 (prior to its revision in January 1943) for a

taxable year has been filed prior to May 8, 1943, the date of the approval of Treasury Decision 5264, such application shall be considered an application for relief under section 722, but the relief for which such application constitutes a claim shall be restricted to the specific grounds stated in the application. If new grounds in addition to those set forth in such application are relied upon by the taxpayer for relief under section 722, an amendment to the application already filed for such year shall be filed under oath on Form 991 (revised January 1943).

In any case in which the taxpayer claims on its excess profits tax return, in accordance with section 710 (a) (5) and section 35.710–5, the benefit of a tax deferment under section 710 (a) (5), it must attach duplicate copies of its completed application for relief under section 722 on Form 991 (revised January, 1943) to its excess profits tax return on Form 1121. If a taxpayer files an excess profits tax return on which is deducted a tax deferment claimed under section 710 (a) (5) without attaching a completed Form 991 (revised January, 1943) thereto, the taxpayer will not be deemed to have claimed on its return in accordance with section 710 (a) (5) and section 35.710–5 the benefits of section 722. (See section 35.710–5.) (In such case, the amount of tax shown on the return shall be the amount shown by the taxpayer increased by the amount of tax deferment improperly claimed. In order to obtain the benefits of section 722 with respect to the tax thus shown on the return in such a case, the taxpayer must file an application for relief under section 722 on Form 991 (revised January, 1943) within the period of time for filing a claim for credit or refund prescribed by section 322.

Except as otherwise provided in this section, the application on Form 991 (revised January,

1943) must set forth in detail and under oath each ground under section 722 upon which the claim for relief is based, and facts sufficient to apprise the Commissioner of the exact basis thereof. The mere statement of the provision or provisions of law under section 722 upon which the claim for relief is based shall not constitute an application for relief within the meaning of section 722. It is incumbent upon the taxpayer to prepare a true and complete claim and to substantiate it by clear and convincing evidence of all the facts necessary to establish the claim for relief; failure to do so will result in the disallowance of the claim. If a claim for relief is based upon section 722 (b) (5) and section 35.722–3 (e) (relating to factors other than those expressly provided by section 722 (b) (1), (2), (3), and (4) and section 35.722–3 (a), (b), (c), and (d)), the application must state the factors which affect the business of the taxpayer, which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period, and the reasons why the extension of relief under section 722 to the taxpayer would not be inconsistent with the principles underlying the provisions of section 722 (b) (1), (2), (3), and (4) and section 35.722–3 (a), (b), (c), and (d), and with the conditions and limitations enumerated therein. Only one application for relief under section 722 shall be filed for an excess profits tax taxable year. New grounds or additional facts not contained in the original application shall be presented as an amendment to the original application for the taxable year. Any supplemental or additional applications filed after the filing of the original application shall be considered amendments to the original application previously filed. No new grounds presented by the taxpayer after the period of time for filing a claim for credit or refund prescribed by section 322

and no new grounds or additional facts presented after the disallowance, in whole or in part, of the application for relief and the claim for refund based thereon, will be considered in determining whether the taxpayer is entitled to relief or the amount of the constructive average base period net income to be used in computing such relief for the taxable year.

* * * * *

A separate application on Form 991 (revised January 1943) shall be filed for each taxable year for which relief is claimed under section 722, except as otherwise provided by (d) of this section. If an application for relief (whether under section 722 prior to its amendment by the Revenue Act of 1942 or after such amendment) has been filed for any excess profits tax taxable year prior to the current taxable year for which relief is claimed, the supporting data and information submitted with such earlier application need not be repeated on Form 991 (revised January 1943), filed for the current taxable year provided reference is made to such earlier application as constituting part of Form 991 (revised January 1943), filed for the current taxable year. If the grounds for relief and the amount of the constructive average base period net income claimed for use in computing the excess profits tax for the current taxable year are the same as those contained in an application for relief filed with respect to a prior taxable year, and if a constructive average base period net income has not been determined which under the provisions of (d) of this section may be used by the taxpayer in computing its excess profits tax for the current taxable year for which relief is claimed, only the first page and pertinent lines of Schedule A, Form 991 (revised January 1943), for the current taxable year need be executed under oath provided that the data and information filed with

the application for such prior taxable year are incorporated by reference in the application for the current taxable year. See (d) of this section for requirements with respect to application for the benefits of section 722 where relief has been determined for a prior taxable year.

In order to obtain the benefits of an unused excess profits credit for any taxable year for which an application for relief on Form 991 (revised January 1943) was not filed, using the excess profits credit based on a constructive average base period net income as an unused excess profits credit carry-over or carry-back, the taxpayer, except as otherwise provided in (d) of this section, must file an application on Form 991 (revised January 1943), for the taxable year to which such unused excess profits credit carry-over or carry-back is to be applied within the period of time prescribed by section 322 for the filing of a claim for credit or refund for such latter taxable year. In addition to all other information required, such application shall contain a complete statement of the facts upon which it is based and which existed with respect to the taxable year for which the unused excess profits credit so computed is claimed to have arisen, and shall claim the benefit of the unused excess profits credit carry-over or carry-back. If an application on Form 991 (revised January 1943), for the benefits of section 722 has been filed with respect to any taxable year, or if the filing of such application is unnecessary under (d) of this section, and if the excess profits credit based upon a constructive average base period net income determined for such taxable year produces an unused excess profits credit for such year, to obtain the benefits of such unused excess profits credit as an unused excess profits credit carry-over or carry-back the taxpayer should file an application upon Form 911 (revised January 1943), or an amendment to such application if

already filed, for the taxable year to which such unused excess profits credit carry-over, or carry-back is to be applied.

Such application or amendment should be filed within the period of time prescribed by section 322 for the filing of a claim for credit or refund for the taxable year to which the carry-over or carry-back is to be applied. In addition to all other information required, such application or amendment should incorporate by reference the data and information submitted in support of the application filed for the taxable year for which the unused excess profits credit arose, and in addition should claim the benefit of the unused excess profits credit carry-over or carry-back. If the facts and circumstances which affected the taxpayer during the base period and during the excess profits tax taxable year to which the unused excess profits credit carry-over or carry-back is to be applied are different from those which affected the taxpayer during the base period and during the year for which the unused excess profits credit arose, the determination of the constructive average base period net income to be used in the computation of the unused excess profits credit shall be made in the light of the facts as they existed with respect to the year for which such unused excess profits credit is computed. As to the extent to which the application for relief on Form 991 (revised January 1943), or an amendment thereto, claiming the benefit of an unused excess profits credit carry-over or carry-back constitutes a claim for refund, see (c) of this section.

(c) *Claim for refund.*—The application on Form 991 or Form 991 (revised January 1943) shall be considered a claim for refund or credit with respect to the excess profits tax for the taxable year for which the application is filed which has been paid at or prior to the time such application is filed. The amount of credit

or refund claimed shall be the excess of the amount of excess profits tax for the taxable year paid over the amount of excess profits tax claimed to be payable computed pursuant to the provisions of section 722. In case the taxpayer elects to pay in installments the tax shown upon its return and at the time the application is filed such tax has not been paid in full, the taxpayer should file a claim for refund on Form 843 as promptly as possible after such tax has been paid in full. The information already submitted in the application need not again be submitted on Form 843 if reference is made therein to such application. For limitations upon refunds and credits generally, see section 322. As to procedure upon disallowance of a claim for refund of an excess profits tax which is claimed to be excessive and discriminatory under section 722, see section 732.

* * * * *

(d) *Waiver of limitations for subsequent taxable years.*—The taxpayer shall file an application for relief under section 722 for each taxable year for which such relief is claimed, regardless of whether a constructive average base period net income has been determined with respect to such taxpayer for a prior taxable year. However, if a constructive average base period net income has been finally determined under section 722 (a) with respect to the taxpayer or if permission is granted by the Commissioner after a determination which has not become final, such taxpayer may use the constructive average base period net income so determined, except as further adjustments may be required by section 711 (b), in computing its excess profits credit based on income, its adjusted excess profits net income, and its excess profits tax in any return required to be filed thereafter. * * *

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U. S. GOVERNMENT PRINTING OFFICE: 1957

No. 15369

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UTILITY APPLIANCE CORPORATION, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

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No. 15369

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UTILITY APPLIANCE CORPORATION, a Corporation,

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COMMISSIONER OF INTERNAL REVENUE,

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PETITIONER'S REPLY BRIEF.

I.

Respondent Confuses the Issue. The Taxes Involved Are Solely Excess Profits Taxes for 1944, and the Issue Is Whether, in Computing the Excess Profits Taxes for That Year, the Timely Claims, as Properly Amended, Embraced the Use of a CABPNI, Not Only for 1943 and 1944, Which Was Allowed, but Also for 1945.

Respondent throughout his brief confuses the issue. As respondent again and again frames the issue (Br. 4, 12-13, 15, 30, and 36), and as he again and again declares (Br. 13, 32, and 34), it would appear that petitioner never, within the statutory period, requested a carry-back of unused excess profits credit from 1945 to 1944, and also that no CABPNI was ever allowed in that computation. That is not true.

A carry-back of unused excess profits credit from 1945 to 1944 was *specifically requested* by petitioner from the very beginning (Br. 6) and was allowed by respondent as far back as November 25, 1946 (Br. 6), as well as in a revenue agent's report dated June 10, 1947 (Br. 5), and again in the deficiency notice (Br. 4-5).

Before the Tax Court, moreover, respondent conceded that, *in computing that carry-back,* the excess profits credit for 1943 was properly determined by use of a CABPNI (Br. 5). The only question is whether, in computing that same carry-back, from 1945 to 1944, a CABPNI should also be used for 1945. There is no other question here.

II.

Respondent Erroneously Represents the Contents of the Application for Relief Timely Filed. The Claim of CABPNI Therein Was General and Applied as Well to Any Year Involved in the Computation of Excess Profits Taxes for 1944.

Respondent erroneously represents the contents of the application for relief, Form 991, filed by petitioner on May 15, 1945. Respondent depicts that form as if, in the computation of relief for 1944, it specifically requested the use of a CABPNI for 1944, but not for 1943 or 1945 (Br. 7, 8, 14, 27, 31, 32). This is clear error.

This court need not speculate as to what that form contained. It is included in Document 11 as joint exhibit 5-E.* It does claim a CABPNI of $161,058.71, and it does make that claim for the purpose of comput-

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*The printing of this document has been requested.

ing the excess profits taxes for 1944. But it does not say that, in the computation of the excess profits taxes for 1944, the CABPNI claimed should be applied to 1944, or to any other specific year. In an attached schedule that figure of $161,058.71 is claimed only as the final figure under a schedule entitled "Constructive average base period net income," and on page 2, line 6, of the application 95% of that sum, or $153,005.78, is claimed as the "Amount of constructive average base period net income claimed for use in computing excess profits tax for taxable year." It does not say that, "in computing excess profits tax for taxable year," the figure given should be applied only to 1944. Indeed, the very contrary is to be implied. The implication is that that figure is to be applied to *every year involved in computing excess profits tax for 1944.*

Here 1943, 1944, and 1945 were all involved in the tax computation for 1944, and the CABPNI could be applied to all three, and the amount in each case is necessarily, and as respondent has agreed, the same. In his deficiency notice respondent applied it only to 1944; before the Tax Court he conceded that it should also be applied to 1943; and the only question here is whether it should also be applied to 1945. But the form filed by petitioner did not specify any one of the years.

It is obvious, of course, that the person who prepared the forms for petitioner did not know one year from the other in this connection. He did not even carry on to the Form 843 filed February 28, 1949, the computation of unused excess profits credit made in the report of the revenue agent dated June 10, 1947 (Br. 5, 8). Respondent disregarded that omission. It was respondent

who, in his deficiency notice, became specific by applying the CABPNI to 1944 and including the carry-back computed without CABPNI.

Nor is the degree of specificity of the claim as vital as respondent assumes. In *United States v. Memphis Cotton Oil Company,* 288 U. S. 62, 53 S. Ct. 278, the Supreme Court stated, 288 U. S. at p. 70:

> "No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts may then appear."

III.

Petitioner Fully Satisfied the Requirements of the Regulations.

As respondent points out (Br. 27), the regulations required that the taxpayer in its application for relief set forth in detail "each ground *under Section 722* upon which the claim for relief is based, and facts sufficient to apprise the Commissioner of the exact basis thereof." (Italics added). But the record shows that petitioner did do this as to each ground *under Section 722.* That information was identically the same for every excess profits tax year, and the Commissioner made a determination based upon it for every such year.

The record is also clear that petitioner, during the statutory period for filing claims, not only apprised the Commissioner of the basis of each ground *under Section 722,* but fully apprised the Commissioner that he claimed the carry-back of unused excess profits credit. There was (1) the specific claim for such credit, allowed November 25, 1946 (Br. 6), (2) the allowance of such credit in the revenue agent's report dated June 10, 1947 (Br. 5), (3)

the reference to carry-back in an official letter dated December 3, 1948 (Br. 9), and (4) the discussions prior thereto in respect to carry-back in conferences with the revenue office under Section 722 (Br. 10). Indeed, respondent conceded that the CABPNI should be applied to one of the years involved in the carry-back for the 1944 tax computation—1943. He only says that it should not be applied to the other year involved in that same computation—1945.

Yet, respondent does not and cannot say that the CABPNI would be any different for one year than for another. Whether 1941, 1942, 1943, 1944, or 1945, it is the same CABPNI, in amount, in origin, and in every other way. Petitioner timely requested a carry-back, and timely requested a CABPNI. With the tax involved so extremely complex, how much more specific can the taxpayer be?

IV.

If Petitioner's Application for Relief Was Not Sufficiently Specific in Respect to Use of a CABPNI for 1945 Then This Defect Was Fully Waived by the Commissioner's Consideration on the Merits of the Amendment in That Respect.

Respondent refers to the deficiency notice as showing the respondent did not waive any requirement of the regulations respecting a 1945 CABPNI (Br. 33, 35). What respondent appears to contend is that the waiver represented by consideration of the amendment on the merits was revoked by the deficiency notice.

In the case of *United States v. Elgin National Watch Co.* (C. A. 7), 66 F. 2d 344, cited in petitioner's opening brief, page 21, the situation was the same as here. There,

too, *after* consideration of amendments on the merits, and when the final decision to pay or not to pay arrived, the Commissioner raised the issue of the statute of limitations. In *United States v. Memphis Cotton Oil Company*, 288 U. S. 62, 53 S. Ct. 278, also cited on this point in petitioner's opening brief, the same thing happened. There the Supreme Court found, 288 U. S. at p. 71:

> "Of a sudden, at the end, the discovery is made that the inquiry is mere futility because the notice starting it in motion has departed in form from the requirements of a rule."

As the court there held, consideration of a claim on the merits constitutes a waiver of any defect of form and after such consideration any attempted revocation of the waiver which it constitutes comes too late. The court there said, 288 U. S. at p. 71:

> "If, however, he [the Commissioner] holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old."

V.

Section 322(b)(6) Should Be Liberally Construed to Give the Relief It Was Intended to Provide.

Respondent contends (Br. 36), that Section 722, being a relief measure, should be strictly construed. But that section is not being construed here. The section being construed is Section 322. Of that section the part specially applicable to carry-backs, Section 322(b)(6), was intended to extend, in the case of carry-backs, the statu-

tory period generally provided under Section 322 (b)(1). May we repeat the quotation from *Bonwit Teller & Company v. United States,* 283 U. S. 258, contained in petitioner's opening brief at page 17:

> "Manifestly it [the increase in time allowed] is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide."

VI.

Petitioner Is Precisely Supported by the Decision of the Eighth Circuit in the May Seed and Nursery Company Case.

Respondent relies heavily on *May Seed and Nursery Co. v. Commissioner* (C. A. 8), 242 F. 2d 151 (Br. 19, 26, 32). That case, however, not only does not support respondent; it directly and specifically supports petitioner here.

In that case the facts were identically the same as in the case here with one critical exception. In that case the amendment of the claim was made *after the claim had been fully considered and rejected.* No consideration on the merits followed the amendment. The court there stated:

> "Moreover, if the situation were one in which sec. 322(b)(1) had been satisfied otherwise, the Commissioner could, for reasons which he might deem sufficient, have allowed the application under sec. 722(a) to be amended, to make claim for the benefit of any unused excess profits credit for 1941, upon request on the part of the taxpayer to him, *at any time up to the final disposition of the application,* which occurred in 1952. Cf. Angelus Milling Co. v. Commissioner, 325 U. S. 293, 297, 65 S. Ct. 1162, 89 L. Ed. 1619; United States v. Memphis Cotton Oil Co., 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619." (Italics added.)

This is precisely what happened here. Petitioner submits therefore that the *May Seed and Nursery Co.* case clearly and fully supports its position.

Conclusion.

Petitioner states in conclusion that the sole question involved here is whether in computing its excess profits taxes for 1944 its timely claims as properly amended embrace the use of a CABPNI, not only for 1944, and 1943, which were allowed, but also for 1945. Petitioner further states that its claim of CABPNI was generally made in its application for relief and applied to every year involved in the computation of excess profits taxes for 1944, that is, 1943, 1944, and 1945. Petitioner in its application set forth in detail each ground under Section 722 upon which its claim for relief was based and the facts and information upon which the claim was based. Further, even if petitioner's application for relief was not sufficiently specific, this defect was waived by the Commissioner's consideration on the merits of the amendment filed by petitioner. Finally, Section 322(b)(6) is to be liberally construed in favor of the taxpayer in order to give the relief it was intended to provide.

Respectfully submitted,

George T. Altman,
Attorney for Petitioner.

No. 15374

United States
Court of Appeals
for the Ninth Circuit

RICHARD E. BENNETT, Administrator of the Estate of EVELYN E. BENNETT, Deceased,

Appellant,

vs.

ARCTIC INSULATION, INC., and DELBERT E. BOYER, Agent, etc.,

Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska, Fourth Judicial Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-29-57

No. 15374

United States
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RICHARD E. BENNETT, Administrator of the Estate of EVELYN E. BENNETT, Deceased,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the District of Alaska,
Fourth Division

No. 9072

RICHARD E. BENNETT, Administrator of the Estate of EVELYN E. BENNETT, Deceased,
Plaintiff,

vs.

ARCTIC INSULATION, INC., and DELBERT E. BOYER, Agent Acting Within the Scope of His Employment,
Defendants.

AMENDED COMPLAINT

The above-named plaintiff, Richard E. Bennett, brings this, his petition, against Arctic Insulation, Inc., and Delbert E. Boyer, agent acting within the scope of his employment, and for cause of action alleges:

I.

That the plaintiff is the duly appointed, qualified and acting Administrator of the Estate of Evelyn E. Bennett, Deceased, by virtue of an appointment of the Probate Court of Fairbanks, Fairbanks Precinct, Fourth Division, Territory of Alaska; that Evelyn E. Bennett, died intestate in the said Fairbanks Precinct, Fourth Division, Territory of Alaska, on the 3rd day of October, 1954, and at the time of her death was a resident and inhabitant of said Precinct, Division and Territory.

II.

That the defendant, Arctic Insulation, Inc., was on the 3rd day of October, 1954, the owner of a certain 1953 Ford Pickup vehicle.

That on said day the defendant, Delbert E. Boyer, agent acting within the scope of his employment, did negligently, and carelessly leave, unlocked, the said vehicle with the keys therein and unattended at Fairbanks, Alaska, that he did so in the area of several night clubs at South Fairbanks, Alaska.

That said Delbert E. Boyer, knew or should have known or should have reasonably foreseen that the vehicle was left in such a place where the same might be removed without consent or authority and that plaintiff might be damaged thereby.

III.

That on said day, one William F. Harris, a soldier or airman in the United States Service, did steal or assume possession of the said vehicle from the place where the same was left unattended and did carelessly and negligently drive the same on the Richardson Highway to a place about One Hundred (100) feet from an intersection where a road known as the Badger Road intersects with a public highway of the Territory of Alaska, known as the Richardson Highway, and did at said time and place, carelessly and negligently cause the said stolen vehicle to strike the automobile in which plaintiff's decedent was riding, causing fatal injuries which were the direct and proximate cause

of the death of plaintiff's decedent resulting from the negligence of said defendant and each of them as aforesaid.

IV.

That plaintiff further alleges that plaintiff's decedent was a member of the family composed of plaintiff's decedent, plaintiff and Katheryn E. Bennett, born December 18, 1942; and that each of them are still living and by the death of plaintiff's decedent, Evelyn E. Bennett, they were, and are, damaged in the sum of Fifty Thousand ($50,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendants in the sum of Fifty Thousand ($50,000.00) Dollars, and for such other and further relief as to the Court may seem just and equitable.

Dated at Fairbanks, Alaska, this 12th day of September, 1956.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Duly verified.

Receipt of copy acknowledged.

Lodged September 13, 1956.

[Endorsed]: Filed September 14, 1956.

[Title of District Court and Cause.]

MOTION TO STRIKE OR DISMISS AMENDED COMPLAINT

Now come the defendants, Arctic Insulation, Inc., a corporation, and Delbert E. Boyer, by their attorneys, Collins, Clasby and Sczudlo, and move in the alternative as follows:

1. That the amended complaint of the plaintiff filed in the above-entitled cause be stricken for the reason that it is substantially the same as the complaint originally filed in this case on May 18, 1956, which original complaint was dismissed by order of this court entered on September 4, 1956.

2. That, in the alternative, the above-entitled cause and the amended complaint filed therein be dismissed upon the ground and for the reason that said amended complaint fails to state facts sufficient to constitute a claim for relief against said defendants for the following reasons: (a) No acts of negligence by said defendants sufficient to support said cause are alleged; (b) no purported negligence of said defendants constituted the proximate cause of the death of Evelyn E. Bennett; (c) the wrongful death, if any, of said Evelyn E. Bennett was caused by the negligence of William F. Harris, who stole or assumed possession, without authority, of the vehicle alleged in the amended complaint; and (d) that said defendant Delbert E. Boyer was not acting within the scope of his employment and was not the agent of said defendant Arctic Insulation, Inc., at the time of the accident alleged in said amended

complaint, or at the time that the vehicle described in the amended complaint, as owned by said corporate defendant, was stolen or unauthorized possession thereof taken by William F. Harris.

In support of the above and foregoing motion said defendants do hereby respectfully call to the attention of the court the following:

A. In support of the motion to strike, the court's attention is respectfully directed to the amended complaint. It differs from the original complaint in only the following respects: (1) the introductory paragraph does not state that said amended complaint is filed pursuant to the provisions of Title 4 of the Legislative Reorganization Act of 1946, as amended, known as Federal Tort Claims Act; (2) in paragraph II of said amended complaint, in the fourth line thereof, the words "negligently and carelessly" are added; and (3) in paragraph III of said amended complaint the following words are added at the end of said paragraph "resulting from the negligence of said defendant and each of them as aforesaid."

The court, in open court, prior to the entry of of said order of dismissal of September 4, 1956, indicated that it was not considering as a basis for said order the fact that the original complaint apparently erroneously referred to its being filed under the Federal Tort Claims Act. The other additions above mentioned, made to the amended complaint, do not in any way alter the cause of action as originally stated in the first complaint filed, or

remove the grounds on the basis of which said order of dismissal was entered on September 4, 1956.

Consequently, said amended complaint should be stricken.

B. In the alternative, in the event the court does not deem that said amended complaint should be stricken, then in support of the motion to dismiss said amended complaint on the grounds above stated, these defendants adopt the matters set out in the memorandum brief filed by the defendant Delbert E. Boyer in the above cause on June 12, 1956, the memorandum brief filed by the defendant Arctic Insulation, Inc., in the above-entitled cause on June 27, 1956, and the memorandum reply brief filed by both of said defendants on July 13, 1956, in the above-entitled cause.

The same arguments and citations contained in said memorandum briefs above mentioned apply now in support of the present motion of said defendants to dismiss said amended complaint, since the latter is substantially the same as the original complaint filed in this cause, and the grounds for the dismissal entered September 4, 1956, apply again in the case of said amended complaint.

Dated at Fairbanks, Alaska, this 21st day of September, 1956.

COLLINS, CLASBY and
SCZUDLO,

By /s/ WALTER SCZUDLO,
Attorneys for Defendants.

NOTICE OF HEARING

To: Robert A. Parrish, Attorney for Plaintiff

Notice Is Hereby Given that the motions of the defendants Arctic Insulation, Inc., and Delbert E. Boyer to strike or dismiss the amended complaint filed in the above-entitled cause will be brought up for hearing in the courtroom usually occupied by the above court on September 28, 1956, at 1:30 o'clock in the afternoon, or as soon thereafter as counsel may be heard. At which time and place you may appear if you see fit.

COLLINS, CLASBY AND SCZLUDO,

By /s/ WALTER SCZLUDO,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 21, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73 (b)

Notice Is Hereby Given that Richard E. Bennett, Administrator of the Estate of Evelyn E. Bennett, plaintiff above named, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain Order of Dismissal filed herein on the 28th day of September, 1956.

Dated at Fairbanks, Alaska, this 16th day of October, 1956.

/s/ ROBERT A. PARRISH,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 23, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now, Richard E. Bennett, etc., appellant herein, by his attorney, Robert A. Parrish, and states that the points upon which it intends to rely in this appeal are as follows:

The Court erred in granting defendants' Motion for Dismissal

Dated at Fairbanks, Alaska, this 16th day of October, 1956.

/s/ ROBERT A. PARRISH,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 23, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the defendants above, Arctic Insulation, Inc., and Delbert E. Boyer, the sum of Two Hundred Fifty ($250.00) Dollars.

The condition of this bond is that, whereas the plaintiff has appealed to the United States Court of Appeals for the Ninth Circuit by notice of appeal filed herewith, from the Order of Dismissal of this Court entered the 28th day of September, 1956, and if the plaintiff shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated this 23 day of October, 1956, at Fairbanks, Alaska.

/s/ REUEL M. GRIFFIN,
Principle;

/s/ DUANE HALL,

/s/ EDGAR M. CLAUSEN,
Sureties.

Subscribed and Sworn to before me this 23rd day of October, 1956.

[Seal] /s/ ROBERT A. PARRISH,
Notary Public in and for the
Territory of Alaska.

My Commission expires February 9, 1960.

Approved:

.....

We, the undersigned sureties, each for himself and not one for the other, say that we reside at Fairbanks, Alaska; that our net worth is the sum of $1,000.00.

/s/ DUANE HALL,

/s/ EDGAR M. CLAUSEN,
Sureties.

Subscribed and Sworn to before me this 23rd day of October, 1956.

[Seal] /s/ ROBERT A. PARRISH,
Notary Public in and for the
Territory of Alaska.

My Commission expires February 9, 1960.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 24, 1956.

In the District Court for the District of Alaska,
Fourth Division

No. 9072

RICHARD E. BENNETT, Administrator of the Estate of EVELYN E. BENNETT, Deceased,

Plaintiff,

vs.

ARCTIC INSULATION, INC., and DELBERT E. BOYER, Agent Acting Within the Scope of His Employment,

Defendants.

FINAL ORDER OF DISMISSAL AND JUDGMENT

This Matter coming on for hearing upon motion of the defendants to strike or dismiss the amended complaint filed in the above-entitled cause and the above-entitled action and upon defendants' motion for costs and attorneys' fees; and the court having examined the files in the above cause and proceedings therein and the briefs filed in said cause, and having heard statements of counsel and being otherwise fully advised in the premises; and it appearing and the court finding that the court heretofore dismissed the complaint filed in the above cause and said cause on September 4, 1956, for reasons stated in the order entered on September 4, 1956, and that the same reasons now apply.

It Is Now Therefore, Ordered, Adjudged and Decreed as follows:

1. That the defendants' motion to strike be and it is hereby denied.

2. That the defendants' motion to dismiss the amended complaint and the above-entitled action be and it is hereby granted, and said amended complaint and this cause be and they are hereby dismissed.

3. That the defendants' motion for costs and attorneys' fees be and it is hereby granted and reasonable attorneys' fees incurred by said defendants be and they are hereby assessed in the sum of $300.00 and allowed to said defendants as costs, and the clerk is hereby directed to enter as additional costs in favor of said defendants any costs incurred by them as may be disclosed by any cost bill filed by said defendants on or before ten days after date hereof, and judgment therefore against said plaintiff be and it is hereby entered.

4. That pursuant to stipulation of parties made in open court the above and foregoing order and judgment be and it is hereby entered nunc pro tunc September 28, 1956.

5. That pursuant to stipulation of parties made in open court the clerk of this court be and he is hereby directed to include a copy of this order and judgment in the record on appeal being prepared in

this cause in lieu of the minute order entered on or about September 28, 1956.

Done and Entered this 20th day of November, 1956.

/s/ VERNON D. FORBES,
U. S. District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered November 20, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings in this cause contained in the Second Amended Designation of Record on Appeal of the plaintiff and appellant, and the additional Designation of Record on Appeal of the Defendants and Appellee, viz:

1. Amended Complaint.
2. Motion to strike or dismiss Amended Complaint.
3. Minute Order of Dismissal of Action.
4. Notice of Appeal under Rule 73 (b).
5. Statements of Points on Appeal.
6. Bond for Costs on Appeal.
7. Final Order of Dismissal and Judgment.
8. Second Amended Designation of Record on Appeal.

9. Complaint.

10. Motion to Dismiss of Defendant Delbert E. Boyer.

11. Motion to Dismiss of defendant Arctic Insulation Co.

12. Order of Dismissal.

13. Brief in Opposition to defendants' Motion to Strike, etc.

14. Defendants' Additional Designation of Record on Appeal.

Witness my hand and the seal of the above-entitled Court this 27th day of November, 1956.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 15374. United States Court of Appeals for the Ninth Circuit. Richard E. Bennett, Administrator of the Estate of Evelyn E. Bennett, Deceased, Appellant, vs. Arctic Insulation, Inc., and Delbert E. Boyer, Agent, etc., Appellee. Transcript of Record. Appeal From the District Court for the District of Alaska, Fourth Judicial Division.

Filed and Docketed December 4, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15,374

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD E. BENNETT, Administrator of the Estate of EVELYN E. BENNETT, Deceased,

Appellant,

vs.

ARCTIC INSULATION, INC., and DELBERT E. BOYER, Agent, Acting Within the Scope of His Employment,

Appellees.

BRIEF OF APPELLANT.

ROBERT A. PARRISH,
544½ Second Avenue, Fairbanks, Alaska,
Attorney for Appellant.

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No. 15,374

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD E. BENNETT, Administrator of the Estate of EVELYN E. BENNETT, Deceased,

Appellant,

vs.

ARCTIC INSULATION, INC., and DELBERT E. BOYER, Agent, Acting Within the Scope of His Employment,

Appellees.

BRIEF OF APPELLANT.

Appellant, the plaintiff below, is seeking by this appeal a review of the final judgment entered by the District Court for the District of Alaska, Fourth Division, Territory of Alaska, on the 20th day of November, 1956, dismissing appellant's amended complaint and cause of action in the lower court in an action for wrongful death.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska, is a court of general jurisdiction (A.C.L.A. 1949, 53-1-1)

in civil, criminal, equity and admiralty cases. The United States Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the final decisions of the District Court for the District of Alaska. (28 U.S.C. 1291, 1294.)

STATEMENT OF CASE.

Appellant, plaintiff, brought this action as Administrator of the Estate of Evelyn E. Bennett, Deceased, to recover for the death of the said Evelyn E. Bennett, caused by the negligent acts of the defendants, appellees, in allowing to be left and leaving keys in a pickup vehicle in an area of night clubs; the said vehicle being stolen by a thief and negligently being crashed into the vehicle in which plaintiff's decedent was riding, causing her death.

This action was commenced by appellant, plaintiff below, on the 18th day of May, 1956.

The Issue.

The issue is whether or not the negligent act of the defendants, appellees, was the proximate cause of the death of plaintiff's decedent and whether or not the results of such negligent acts were reasonably foreseeable and whether or not the question of proximate cause in this case and the question of foreseeability is for the jury based upon the evidence in the case.

Manner in Which the Issue Was Raised.

The Pleadings: Paragraphs II and III of plaintiff's amended complaint are hereinafter set forth:

"That the defendant, Arctic Insulation, Inc., was on the 3rd day of October, 1954, the owner of a certain 1953 Ford Pickup vehicle.

"That on said day the defendant, Delbert E. Boyer, agent acting within the scope of his employment, did negligently, and carelessly leave, unlocked, the said vehicle with the keys therein and unattended at Fairbanks, Alaska; that he did so in the area of several night clubs at South Fairbanks, Alaska.

"That said Delbert E. Boyer, knew or should have known or should have reasonably foreseen that the vehicle was left in such a place where the same might be removed without consent or authority and that plaintiff might be damaged thereby."

"That on said day, one William F. Harris, a soldier or airman in the United States Service, did steal or assume possession of the said vehicle from the place where the same was left unattended and did carelessly and negligently drive the same on the Richardson Highway to a place about One Hundred (100) feet from an intersection where a road known as the Badger Road intersects with a public highway of the Territory of Alaska, known as the Richardson Highway, and did at said time and place, carelessly and negligently cause the said stolen vehicle to strike the automobile in which plaintiff's decedent was riding, causing fatal injuries which were the direct and proximate cause of the death of plaintiff's decedent resulting from the negligence of said defendant and each of them as aforesaid."

SPECIFICATION OF ERROR.

The District Court erred in granting the motion to dismiss the amended complaint of the plaintiff and his cause of action.

ARGUMENT.

SUMMARY.

The appellant's position is that only The Creator is all seeing and omnipotent. Questions of foreseeability of harm to another must be considered in the light of a modern thinking as this question of foreseeability relates to leaving ignition keys in an unattended vehicle. That each individual case must stand or fall upon its own peculiar facts. This does not deprive a court of its supervision after hearing the evidence in a governing case, but only allows the court to exercise its supervision after the evidence and not before the evidence. That the doctrine of foreseeability depends upon what a reasonably prudent man might do or not do under the circumstances, and that this question is for the jury.

It is not deemed worthy of answering the matter of the sufficiency of allegations to establish that Boyer was an employee or agent of the Corporation at the times and places alleged in the complaint. It is generally well settled law that if the plaintiff proves that Boyer was an agent acting within the scope of his employment that such is a question of fact for the jury, the ultimate fact being whether he was such an agent acting within the scope of his employment.

The principal question of negligence in leaving the keys in the vehicle is hereafter briefed fully.

The defendant maintains that it does not believe the acts of leaving the truck unattended and leaving the keys in the ignition switch constitutes negligence, and further that such acts, even if negligent, are not the proximate cause of the plaintiff's decedent's injuries. It is here that we differ.

IT IS THE PLAINTIFF'S BELIEF THAT SUCH ACTS MAY OR MAY NOT AMOUNT TO NEGLIGENCE; THAT SUCH ACTS MAY OR MAY NOT BE THE PROXIMATE CAUSE OF THE PLAINTIFF'S DECEDENT'S INJURIES; THAT THEREFORE, THE DETERMINATION OF THESE ISSUES SHOULD BE LEFT TO A JURY.

1. Negligence.

A person leaving a motor vehicle parked on a public highway is, even in the absence of any violation of statute, ordinance, or regulation controlling such parking, under a duty to exercise ordinary care as to the manner in which he leaves it.

Assuming the existence of a duty, there are many factors which might be considered, in the absence of a statute, as to whether or not leaving a vehicle on a public street unattended and unlocked, with the keys in the ignition, would constitute negligence. In 158 A.L.R. 1376, it is stated that in such a case negligence,

> ". . . depends upon the locality in which the vehicle is left . . ."

Further on it is stated that the negligence,

> ". . . dependent upon particular facts and circumstances in each case, ordinarily [is] a question of fact . . ."

In any event, the issue of negligence is clearly one for the jury, for as stated in *Grand Trunk Railway Co. v. Ives,* 144 U.S. 408, 36 L. Ed. 485,

> ". . . What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury . . ."

The court in *Lee v. Van Buren & N.Y. Bill Posting Co.,* 1920, 190 App. Div. 742, 180 N.Y.S. 295, in reversing a lower court's dismissal of the plaintiff's complaint, said that although an electric truck was not an inherently dangerous instrumentality, under certain circumstances it would become such and therefore it was a jury question whether the defendant owner of the truck would be liable in damages for the death of plaintiff's decedent caused by a stranger starting the truck which defendant's driver had parked unattended in the street and with the keys in the ignition.

In *Barbanes v. Brown,* 110 N.J.L. 6, 163 A. 149, due to the force of gravity or some other cause unknown, the defendant's car was set in motion, causing injury to the plaintiff. The court states that:

> ". . . the general rule is that a person who leaves an automobile in a public street unattended is under a duty to exercise such care in doing so as

> a person of ordinary prudence would exercise in the circumstances; and failure to exercise such care whereby the machine by . . . some . . . cause reasonably to be anticipated or guarded against, gets under way and inflicts injury, renders such person liable therefor, in an action for damages."

See also the following cases specifically holding that even absent a statute or ordinance, failure to secure the ignition switch of a motor vehicle and leaving the doors unlocked, when parking such vehicle on a public street are circumstances tending to establish negligence which gives rise to liability where the vehicle is thereafter set in motion by an intermeddler, and injury to another results, *Lomano v. Ideal Towel Supply Co.,* 1947, 25 N.J. Misc. 162, 51 A2d 888; *Connell v. Berland,* 1928, 223 App. Div. 234, 228 N.Y.S. 20, aff'd. 248 N.Y. 641, 162 N.E. 557; *Tierney v. New York Dugan Broths.,* 1942, 288 N.Y. 16, 41 NE. 2d 161; *Bullock v. Dahlstrom* (1946 Mun. Ct. App. Dist. Col.) 48 A2d 370; *Hatch v. Globe Laundry Co.,* 1934, 132 Me. 379, 171 A. 387; *Barlow v. Verrill,* 1936, 88 N.H. 25, 183 A. 857; *Maggiore v. Laundry & Dry Cleaning Service, Inc.,* (1933 La. App.) 150 So. 394.

2. Proximate cause.

It must be realized that no definition of proximate cause can be completely satisfactory because of the necessity for defining terms used in such definition. Some of the more prominent definitions are the following: An act or omission occurring or concurring

with another, without which act or omission the injury would not have been inflicted, *Wells v. Great Northern R. Co.,* 59 Or. 165; 114 P. 92; 116 P. 1070; 34 L.R.A. (N. S.) 818; *Wodnik v. Luna Park Amusement Co.,* 69 Wash. 648; 125 P. 941; 42 L.R.A. (N. S.) 1070; the "substantial factor" test, by which the actor is liable if his negligence was a substantial factor in producing the injury complained of, 155 A.L.R. 164; the cause which leads to, produces, or contributes directly to, the production of the injury of which complaint is made, *Kelley v. Stout Lumber Co.,* 123 Or. 647; 263 P. 881; 155 A.L.R. 163; thus in *Milton Bradley Co. v. Cooper,* 79 Ga. App. 302; 53 S.E. 2d 751; 11 A.L.R. 2d 1019, the court said that by proximate cause is meant not the last act or cause, or the nearest act to the injury, but such act wanting in ordinary care as actually aided in producing the injury as a direct and existing cause.

Referring to *Wodnik v. Luna Park Amusement Co.,* supra, the authors of American Jurisprudence (38 Am. Jur. 696-7) stated:

> "Since proximate cause as an element of liability for negligence is not necessarily dependent upon nearness in time or distance, with which proximity is most readily associated, but is referred to as that cause without which the accident could not have happened, perhaps 'primary' or 'efficient' would be more descriptive of the cause of which the law takes cognizance than proximate."

But whatever definition a court might use, applying that test it believes best suited, it must always keep

in mind the words of the United States Supreme Court as stated in *Louisiana Mut. Ins. Co. v. Tweed,* 7 Wall. (U.S.) 44; 19 L. Ed. 65:

> ". . . Each case must be decided largely on the *special facts* belonging to it, and often on the very nicest discriminations." (Emphasis added.)

The most common test of proximate cause is that the injury is the natural and probable consequence of the wrongful act or omission, *Booth & Flynn v. Price,* 183 Ark. 975; 39 S.W. 2d 717; 76 A.L.R. 957. Most authorities state an additional condition, that it appears that the injury was anticipated, or that it reasonably should have been foreseen, by the person sought to be charged with liability. *Scheffer v. Washington City, V. M. & G. S. R. Co.,* 105 U.S. 249; 26 L. Ed. 1070; *Wodnik v. Luna Park Amusement Co.,* supra. Under this theory there must be both foreseeability as to the result of negligence and the injury being a natural and probable consequence of the wrongful act or omission. However, there is another popular view, that anticipation of consequences is a necessary element in determining not only whether a particular act or omission is negligent, but also whether the injury complained of is proximately caused by such act or omission. The authorities supporting this view assert that consequences which reasonably might not have been foreseen are not both natural and probable within the general test of proximate cause. Furthermore, they state that a consequence which might reasonably have been anticipated will be deemed probable, notwithstanding it is not

the ordinary consequence, *Knox v. Eden Musee American Co.,* 148 N.Y. 411; 42 N.E. 988; 31 L.R.A. 779; *International-Great Northern R. Co. v. Lowry,* 132 Tex. 272; 121 S.W. 2d 585. In this type of case all that needs to be shown to establish liability is that a prudent man would foresee some injury or harm might result from his wrongful act and it is unnecessary that he foresee the particular injury that in fact did result, *Pease v. Sinclair,* (C.C.A. 2d), 104 A. 2d 183; 123 A.L.R. 933.

3. Intervening act.

As a general rule, it can be stated that when, between the original negligence and an accident, there intervenes a criminal act of a third person which causes the injury, that the original negligence will not be held to be the proximate cause of the injury finds exceptions where at the time of the original negligence the subsequent criminal act or negligence could have been foreseen, as thus the causal chain is not broken by the intervening act. Thus it is stated in 78 A.L.R. 480 that:

> "The cases vary with the *nature of the community* in which the injury occurred, due to the fact that what might be foreseen under circumstances existing in one community might not be foreseen in another." (Emphasis added.)

While there may be an intervening act which is both independent and responsible, according to *Ford Motor Co. v. Wagoner,* (Tenn.) 192 S.W. 2d 840, 164 A.L.R. 364:

> "The intervening act of even an independent conscious agency will not exculpate the original wronger . . . unless it appears . . . that the negligent intervening act . . . could not have been reasonably anticipated."

In *Daneschock v. Sieble,* 195 Mo. App. 470; 193 S.W. 966, a contractor who placed building materials on the sidewalk beyond the curb, and out into the street, so that pedestrians were compelled to walk out into the street, was, as such result could have been readily foreseen, liable for injuries to pedestrians run down by a reckless motorist.

In *Lombardi v. Wallad,* 98 Conn. 510; 120 Atl. 291; 23 N.C.A. 249, the defendant left an unguarded fire, and a child, after lighting a stick, touched it to the dress of the plaintiff's intestate, the burns proving fatal. The court held that the causal chain was not broken by the intervening act of the child as such act could reasonably have been foreseen by a person of ordinary prudence.

Where two of several crates left unattended and unguarded by the defendant milk retailer on a strip adjacent to and parallel with the curb of a public highway on one side and a public sidewalk on the other, were moved by a stranger into some weeds near the sidewalk, and there obscured from vision, they caused a tractor engaged in mowing weeds to tilt, throwing the tractor off balance, and causing the driver to fall from his seat, whereby he was injured. *Mosley v. Arden Farms Co.,* 26 Cal. App. 2d 130; 157 P. 2d 372. The court pointed out that the question of proximate

cause was essentially one for the jury and that the facts and circumstances of a particular case (here the presence of a nearby school and the resulting heavily traveled sidewalk) must be considered in such determination. Here, even though there was an intervening agency in the chain of causation, the court noted that such agency was not a superseding one exonerating the defendant, because what occurred was reasonably foreseeable and should have been anticipated.

In *Hall v. Coble Dairies, Inc.,* 23 N.C. 206; 67 S.E. 2d 63; 29 A.L.R. 2d 682, the plaintiff alighted from his car in a dazed condition after an auto accident with the defendant's illegally-parked trailer and was struck by a car traveling in the opposite direction. In upholding complaint for personal injuries the court stated that it was not necessary that the tort-feasor foresee the particular consequence of his negligent act or omission, but only that "by the exercise of reasonable care the defendant might have foreseen that some injury could result from his act or omission, or that consequences of a generally injurious nature might have been expected."

In *Hines v. Garret,* 131 Va. 125; 108 S.E. 690, the defendant railroad was held liable where it negligently let the plaintiff off the train beyond the station, she being raped on returning to it. Such intervening criminal act should have been foreseen.

In *McLeod v. Grant County School District No. 128* (Wash.) 225 P.2d 360, children were allowed to play

in the gymnasium of school at noon with a teacher appointed to supervise, and when the teacher absented himself, a school girl was forcibly raped by another student. The school was held liable on the ground that the fact that danger stems from an intervening criminal act, does not exonerate a defendant from negligence, if such intervening force is reasonably foreseeable.

4. **Defendant's negligence in leaving the vehicle unattended, unlocked and with keys in the ignition, will not be insulated so as to relieve him from liability to the person injured in consequence of such negligence, although the immediate cause of the injury was a negligent intervening act or omission of a third person.**

The New York Court of Appeals, in *Maloney v. Kaplan,* 233 N.Y. 426; 135 N.E. 838, has stated broadly that:

> "If one is negligent in leaving a motor vehicle improperly secured, if as a result thereof and in immediate sequence therewith, some other event occurs, which would not have occurred except for such negligence, and if injury follows, such a one is responsible, even though the negligent act come first in order of time."

In *Tierney v. New York Dugan Broths.,* supra, the driver left the safety switch off but unlocked, and the doors open, when he parked in order to make deliveries in a neighborhood where he knew children to be at play. The New York Court of Appeals held that even though the driver did not violate any statute, that in leaving a motor vehicle unattended in a public

street, the question of negligence so as to be liable for an injury to a third person caused by a child starting the vehicle, is a question of fact for the jury to determine.

In *Lomano v. Ideal Towel Supply Co.,* supra, where the driver left the keys in a truck after parking and small boys started the motor causing the truck to back into plaintiff's parked car, the truck owner was liable for damages sustained on the ground that what happened could reasonably have been foreseen and guarded against. See also *Campbell v. Model Steam Laundry,* 130 S.E. 638; 190 N.C. 649.

In *Morris v. Bolling,* (Tenn.) 218 S.W. 2d 754, a drunken passenger of a taxicab drove the taxi away when left alone in the front seat by the driver, with the keys in the ignition. The court found the defendant company liable for injuries resulting from the accident with the plaintiff's parked automobile. Quoting *Garis v. Eberling,* 18 Tenn. App. 1; 71 S.W. 2d 215:

> "Mere fact that intervention of responsible human being can be traced between defendant's wrongful act and injury complained of will not absolve defendant; general rule being that one doing wrongful act is answerable for all consequences ensuing in ordinary course of events, though such consequences are immediately and directly brought about by intervening cause, if such intervening cause was set in motion by original wrongdoer, or was only condition through which negligent act operated to produce injurious result."

And quoting *Fairbanks, Morse & Co. v. Gambill,* 142 Tenn. 633; 222 S.W. 5, 7,

> "The general rule is that what is the proximate cause of an injury is a question for the jury; the court instructing them as to what the law requires to constitute it, and the jury applying the law to the facts. But *whether the question is one to be determined by the jury depends on the facts of each case.* Thus where the facts of the particular case are controverted and are of such a character that different minds might reasonably draw different conclusions therefrom, a question of facts is presented properly determinable by the jury.
>
> "To the same effect is the rule where an independent intervening efficient cause is relied on by the defendant.
>
> "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the act—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

The court then went on to say:

> "It being common knowledge that the acts of a drunken person are unpredictable, the issue of whether the agent or driver of defendant's cab was negligent by going off and leaving the key in the switch with a drunken passenger alone on the front seat of the cab was a jury question. Also, the issues of whether the defendant's agent under the circumstances might or ought to have foreseen the result of his acts and whether said

> acts contributed to the damages plaintiff sustained were jury questions and not issues to be determined by the court as matters of law, they being questions about which men of reasonable minds would differ." (Emphasis added.)

In *Schaff, et al., v. R. W. Claxton, Inc.,* (1944) 74 App. D. C. 207, 144 F. 2d 532, driver of the defendant's truck left it in a parking space beside a restaurant to which the driver was delivering goods. The truck was left unattended, unlocked and with the keys in the ignition when some restaurant employee drove off in the truck and injured the plaintiffs. The court stated:

> ". . . the evidence in the present case should have been submitted to the jury with instructions to find for the plaintiffs if they found that the defendant's driver was negligent in leaving the car unlocked and that this negligence was the proximate cause of the accident."

and this was so even though defendant's actions were not in violation of any statute or ordinance.

In *Ney v. Yellow Cab Co.,* 117 N.E. 2d 74; 2 Ill. 2d 74 (1952) where the violation of a statute prohibiting parking a vehicle on a public street unattended and unlocked with the keys in the ignition was considered only prima facie evidence of negligence (page 78), the plaintiff, owner of a parked automobile which was damaged while a thief was attempting to make his escape in the defendant's taxicab, brought suit against the defendant taxicab owner for negligently leaving

the cab unattended on a Chicago street without removing the key from the ignition. The court's ruling was premised on the doctrine that the intervention of a criminal act does not necessarily interrupt the relation of cause and effect between negligence and an injury. If at the time of the negligence the criminal act might reasonably have been foreseen, the causal chain is not broken by the intervention. At page 79 the court said:

> "The increase in population and number of motor vehicles owned and operated in this country in the past few years is well known. The increase of casualties from automobile thefts and damages and injuries resulting from such larcenous escapades has accordingly increased. . . . Incidents of serious havoc caused by runaway thieves or irresponsible juveniles in stolen or 'borrowed' motor vehicles frequently shock the readers of the daily press. *With this background must come a recognition of the probable danger of the resulting injury consequent to permitting a motor vehicle to become easily available to an unauthorized person.* . . . The percentage of cases of this nature or the incidents of injury done where an independent force has intervened after such violation, however, is not the standard or measure of liability. We are here concerned only with the question as to whether or not this intervening force is without or within the range of reasonable anticipation and probability.
>
> ". . . Cases similar to the one at bar have reached the higher courts . . . wherein experienced and learned lawyers and judges have differed on this question on probable cause. That reasonable minds can and have disagreed on this question

> cannot be denied. With these incontrovertible facts before us, we recall the reasoning of Justice Cardozo, that the range of reasonable apprehension is at times for the court, and at times, if varying inferences are possible, a question for the jury. *The possibility of varying inferences in a case such as the one before us has been amply demonstrated . . .*"
>
> "Questions of negligence, do care, and proximate cause are ordinarily questions of fact for a jury to decide. . . . It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, *the fact that fair-minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body.* The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its functions." (Emphasis added.)

In so holding, the Supreme Court of Illinois took note of the then existing conflict in Illinois case law as represented by the First District Appellate Court's ruling in *Ostergard v. Frisch,* 33 Ill. App. 359, 77 N.E. 2d 537, that there was liability under similar circumstances, and the Third District Appellate Court's ruling in *Cockrell v. Sullivan,* 334 Ill. App. 620, 101 N.E. 2d 878, that there was no liability. Thus, the *Ney* case resolved the conflict and the inferior court's rul-

ing in the *Cockrell* case clearly is no longer good authority in Illinois.

5. Cases in which there has been a violation of a statute or ordinance prohibiting the leaving of a motor vehicle unattended, unlocked and with the key in the ignition.

In the case at bar, the alleged facts occurred in the Territory of Alaska. As far as the plaintiff has been able to determine, there is no statute in the Territory of Alaska that prohibits the leaving of an automobile unattended with the keys in the ignition switch.

Regardless, however, the plaintiff maintains that the decisions of cases cited below wherein such a statutory violation was considered should now be followed in deciding whether or not the issues of negligence and proximate cause should be submitted to a jury for determination. While the original fact of negligence may be established by the violation of such statutes, the findings of the courts that reasonable minds might differ as to such negligence being the proximate cause of subsequent injuries caused by an intervening independent act, thus requiring submission of the case to the jury, has been decided independently of the statute. In so deciding, the policy behind the statute, of course, was considered. However, the plaintiff maintains that the presence or absence of a statute is essentially immaterial in establishing the original fact of negligence as previously noted in Section 1, page 5 of this brief, or the resulting proximate cause. To argue otherwise would be to say that since some jurisdictions' recognition of the rapid social transfor-

mations whereby society demands a stronger duty of care among its members, and each to the other, has been translated into statute, another jurisdiction, not having done so, is unable to impose those common law duties which it might otherwise recognize through its judiciary.

In *Ross v. Hartman,* 78 App. D.C. 217; 139 F. 2d 14, the defendant's car had been left in an alley with the keys in the ignition and a third person stole the car and negligently ran over the plaintiff. An ordinance prohibiting the leaving of keys in an unlocked car was used to conclusively show the defendant's negligence in the first instance. That there could have been negligence without such statute was suggested by the court, saying:

> "Everyone knows now that children and thieves frequently cause harm by tampering with locked cars. The danger that they may do so on particular occasions may be slight or great. In the absence of an ordinance, therefore, leaving a car unlocked, might not be negligence in some circumstances, although in other circumstances it might be both negligent and a legal or 'proximate' cause of a resulting accident." (Emphasis added.)

Once having found negligence, the court proceeded to say it was the proximate cause of the accident, not because of the violation of the statute, but because such event was foreseeable. At 158 A.L.R. 1373 N 10, it is emphasized that in the *Ross* case the holding of the negligence to have been the proximate cause was not based upon the statute's violation, but rather as

the consequences were foreseeable. To exemplify this they suggested that if the:

> ". . . intermeddler had simply released the brake of the . . . truck, without making use of the ignition key or unlocked switch, and the truck had thereupon rolled downhill and injured the appellant, the appellee would not have been responsible for injuries because of the negligence of his agent in leaving the switch unlocked, since it would have had no part in causing them."

In *Boland v. Love,* 222 F. 2d 27 (1955), one Coates was hired as a handyman by the defendant. Keys to an automobile owned by the defendant were left by an employee of the defendant above the sunvisor of the defendant's car. Coates, without permission, took the car and drove from Washington, D.C., to Virginia and when returning to Washington, D.C., negligently struck and injured the plaintiff.

The court held on the questions whether there was negligence on the part of the defendant and whether any such negligence was the proximate cause of said injury was a question for the jury. The court said at page 34:

> "It is clear under our common law in applying the standard of ordinary care, that particular conduct, depending on circumstances, can raise an issue for the jury to decide in terms of negligence and proximate cause. . . ."

When so holding the court cited the *Ross v. Hartman,* supra, and *Schaff v. Claxton,* supra, cases, on page 83.

In a 1955 Ohio case, *Garbo v. Walker,* 129 N.E. 2d 537, where a similar statutory violation was considered, the court in overruling the demurrer to the complaint, also discussed man's industrial development, with the resulting benefits to society's members, and the subsequent legal duties consequent therefrom. They concluded that there is a legal duty owing to the injured party in these cases, and that the final decision is to be determined by the jury.

The Ohio court said at page 542:

> "We cannot be unmindful that we live in an age of change. Atomic power, television, jet propulsion, electronics and many other advancements and discoveries were unheard of in the early days of some of us, . . . one may recall to mind what is common knowledge that in this country 100,000 cars were stolen by juveniles in 1953 with the resulting damages to the owners of $150,000,000."

The Ohio court concludes by saying:

> ". . . That the question of whether the defendant in leaving the key in the ignition of her car could reasonably anticipate or foresee that it might be stolen and negligently used by another to proximately cause damage to the plaintiff, was one for the jury."

Also see *Moran v. Borden Co.,* 309 Ill. App. 39; 33 N.E. 2d 166, for the same point on submission of the issue of proximate cause to the jury. In that case the defendant's car was started by a boy in the back of the defendant's home where he had left it with the keys in the ignition, thus violating a statute.

6. **Cases wherein the defendant, by leaving his vehicle unattended, unlocked and with the keys in the ignition, has been held not to have been negligent or that such negligence was not the proximate cause of subsequent injuries to the plaintiff.**

As stated above, the issue of proximate cause is normally regarded as an issue of fact which is to be submitted to the trier of the facts in the usual case. Only if the facts are undisputed and susceptible of only one inference can the causation issue be one of law for the court. Whether an act or omission with respect to the leaving of a motor vehicle on a public street, assuming it is negligent, will result in liability for any subsequent injury or damage if the vehicle has been put in motion by a stranger, depends primarily upon the facts of the individual case, and it is on this basis that the majority of cases holding opposite to the contention of the plaintiff in this case may be distinguished.

In *Simon v. Dew,* 91 A2d 214, the court held that where a car was taken without permission of the owner and lessee of the cab after locking the ignition and leaving the key on the radio in the apartment and someone else obtained it, taking the automobile, the resultant accident was not proximately caused by leaving the keys to one's car in his apartment is negligence. The plaintiff would hardly contend that leaving the keys to one's car in his apartment is negligence. The facts of that case are in variance with those in the case at bar and it is believed that the court in the *Simon* case would not have so held on these facts, for the rules in *Ross v. Hartman,* supra, and

Schaff v. Claxton, supra, would be controlling in their jurisdiction.

In *Lewis v. Amorous,* 59 S.E. 338; 5 Ga. App. 50, the vehicle in question was left in the defendant's place of business, his garage. Correctly, the court stated that it could not:

> "Concede that it would be negligent for a person to leave an automobile in a shop or garage without chaining it down or locking it up . . ."

In *Quellette v. Bethlehem-Hingham Shipyard,* 73 N.E. 2d 592, 321 Mass. 390, the court was unable to find negligence where the stolen vehicle was left in front of the fire station, running, when such was the custom, and further that there was no evidence of negligence on the part of the guards at the gate. Clearly the facts are distinguishable from those in the case at bar for public policy necessitates that fire apparatus be kept in such state that it may readily respond to emergencies.

In *Galbraith v. Levine,* 81 N.E. 2d 560; 232 Mass. 255, again the factual circumstances are not as compelling as those in the instant case in that the vehicle was parked in a private, licensed parking lot and not on a public street. Under these facts the court held that a jury could not reasonably hold the defendant to foresee the theft of his vehicle and thus the resulting negligence, whereby the plaintiff had suffered injury. In addition, it might be well to note that the court in *Garbo v. Walker,* supra, stated:

"The rule in Massachusetts is contrary to Federal decisions and to the decision of the supreme courts of Illinois and California."

In *Fulco v. City Ice Service, Inc.,* 59 So. 2d 198, the court on finding that the defendant's vehicle was left in a private parking lot adjoining the defendant's plant, held it not to be negligent, absent a statute, to leave keys in a vehicle. Here again, the fact that the theft occurred from a private parking lot by the defendant's place of business differentiates it from the facts in the case at bar. There is nothing in the opinion to suggest that had the theft occurred in a different locality that the result would have been the same. Quite significantly that portion of *Ross v. Hartman,* supra, that, ". . . the leaving of a car unlocked might not be negligent in some circumstances, but in other circumstances it could be an act of negligence and therefore a proximate cause of the accident," was quoted with apparent approval. Furthermore, it should be noted that such holding that there was no negligence was not necessary to the judgment inasmuch as the court previously decided said driver was not acting within the scope of his employment.

In *Kiste v. Red Cab, Inc.,* 106 N.E. 2d 395; 122 Ind. App. 587, a thief negligently drove off with the defendant's unattended and unlocked taxicab. The court felt that the mere leaving of keys in a vehicle, in and of itself, was insufficient to show negligence and concluded by saying:

". . . this would not ordinarily be [negligence] except where the surrounding circumstances

> clearly point to both a high probability of intervening crime, and of like negligent operation."

It is the plaintiff's contention that the *Kiste* case would not preclude recovery in Indiana, on the particular facts and circumstances of the case at bar, and that the court would send the case to the jury.

In *Castay et ux v. Katz & Besthoff,* 148 So. 76, the court had no definite evidence before it that a thief in fact stole the car, although it did feel it to be the most likely explanation of its having been set in motion. While holding for the defendant, they did not shut the door on all acts of theft. The court stated:

> "The primary negligence of defendant's driver in leaving the car unattended with the engine running could, under certain circumstances, constitute a continuing act of negligence, and an efficient cause of an accident due to an intervening negligent act subsequent in point of time, if the ultimate consequences may be said to have been such as might reasonably have been foreseen."

And in *Curtis v. Jacobson,* 54 A2d 520, where the defendant's taxicab was stolen from a private driveway where it had been left unattended, unlocked and with the engine running, the court stated, in discussing the question of foreseeability:

> "It must be remembered that the defendant's taxicab was not parked in the street but upon private property."

While recognizing the foreseeability of an intervening criminal act in some cases, the court on page 523,

after stating its approval of holding the defendant liable where children are in the neighborhood, says:

> ". . . it is unreasonable to suppose that a person who has reached years of discretion . . . will conduct themselves similarly."

From the wording the court subsequently used, the plaintiff maintains that the court would have held otherwise had the facts of the instant case been before them, for on page 525 they state:

> "It cannot be said as a matter of law that the defendant's agent was negligent under the circumstances of this case. There was no evidence of surrounding circumstances that defendant's driver had any warning . . . so that the act of a thief could be foreseen."

In a late California case, involving similar facts, *Richards v. Stanley,* 271 P. 2d 23 (1952), there was a majority opinion of three judges and a dissenting opinion of two judges. The majority held that the owner of the vehicle owed no duty to the third person in absence of a statute. The dissenting judges said that when a thief is in flight from the scene of the crime, he normally would not exercise the careful driving habits of the ordinary driver and that the negligence and proximate cause is for the jury.

A 1956 California case, however, *Richardson v. Ham Brothers Construction Co.,* 285 P. 2d 276, stated in dicta that they did not agree with the majority opinion of the *Richards* case. There they sidestepped the Richards holding by differentiating an automobile from a tractor, holding the latter to attract the curi-

osity of people more than an automobile, and thus found the defendant liable. It therefore appears that the California rule is now in conformity with the Federal decisions and those of Illinois, as the court stated in *Garbo v. Walker,* supra.

CONCLUSION.

In the above cited "key cases" varied factual circumstances were before the courts, resulting in a variance of holdings. In those cases the courts were required to decide whether or not an issue of negligence and proximate cause might properly be presented to a jury and in so deciding, two questions invariably were presented to the court:

1. Does an individual have a duty to avoid an act which he might *reasonably foresee* might result in harm to another?

2. Does this duty extend to include the act of a third person?

In most of these cases a third question presents itself, one which requires the court to decide in distinct terms the ultimate answer when it appears in a factual drama of life, as presented in the instant case:

3. Under what factual circumstances may the leaving of a car unlocked, unattended, and with the keys in the ignition, raise an issue for the jury to decide in terms of negligence and legal or proximate cause?

The above questions resolve themselves into a determination of questions or proximate cause and intervening agent. As the cases cited in this brief show, the rationalization of these doctrines has led to a splitting of hairs, disagreement among legal writers, and a conflict of opinion among judges and practicing attorneys as learned and reasonable as we may find as to whether reasonable minds may differ.

These authorities agree that the individual owes no duty to anticipate the act of the intervening third party tort-feasor unless he could reasonably foresee it.

This does not necessarily mean that the acts of all third party tort-feasors must be anticipated, but it does mean that if common human experience would lead the reasonable man to consider that his act might result ultimately in harm to another, then the question of whether injury could have been reasonably foreseen under the particular facts involved is for the jury.

These authorities are also agreed that in these "key cases", at least under some circumstances, the question of negligence and proximate cause is for the jury and though the circumstances are seldom spelled out, the particular facts of this case, particularly the locality in which the incident occurred, so differentiate it from the other "key cases" that it would be difficult to imagine a real life fact circumstance more compelling in its inference of negligence and resulting proximate cause of damage.

The defendant parked his vehicle on a public highway in front of a night club. Within a radius of a

few hundred yards there were several other "clubs" and "bars", their proximity to each other giving rise to their location being referred to as "the strip".

While the driver of the truck left his vehicle unattended, unlocked, and with the keys in the ignition, along "the strip" on a Sunday at approximately 8:30 A.M., it should not be supposed that a tranquil scene such as might occur in the United States on a Sunday morning can be envisioned in that locale. Fairbanks is not such a city. It is a "boom town" which has experienced an enormous doubling and redoubling of its population since the early 1940's. It does not have the usual stability of the Stateside town. In addition, two large installations of the United States Air Force are located nearby, so that it has an unusually large populace constantly visiting. That the conduct of such military visitors, as well as some of the local citizens, is often rowdy, irresponsible, and generally excessive, results largely from the general lack of entertainment facilities in this locale. What little entertainment that does exist can, for the most part, be found at such "clubs", and so on "the strip" Sunday morning becomes merely an extension of Saturday night. Furthermore, "the strip" is frequented more heavily on weekends when the military normally receive their "passes" and thus join the local populace. It was such an hour as this that the driver parked his vehicle on "the strip", leaving it unattended and unlocked with the keys readily available, despite his knowledge that business was continuing

strongly on "the strip". These are the facts which make the case at bar so different from the cases previously noted. The situation here was more perilous, for at that hour the likelihood of "drunks" in the vicinity was all the more probable, the entertainment seekers having had several hours in which they could become thoroughly inebriated.

In leaving the truck in such a manner the driver acted unreasonably. It was not the act of a prudent person and under the circumstances the plaintiff maintains that such actions were gross negligence. The driver's actions were in complete disregard to the safety of the community.

The plaintiff maintains that the court should take judicial notice that intoxicated persons have not the normal use of physical and mental faculties by reason of their use of intoxicating liquor, *Cox v. State,* 150 S.W. 2d 85, 86; 141 Tex. Cr. R. 561. As such, for the period during which they remain intoxicated, they must be treated as an irresponsible group, much as children are, and a wide variety of unpredictable conduct must be contemplated—sulking, exuberance, ill-temper, fighting, vulgarity, pulling stunts, taking "dares", stealing, and otherwise exhibiting conduct which in their normal state they would not do. The scope of their conduct which must be foreseen is very broad. Can the foreseeability that such conduct might lead to the "taking" of a car be improbable, especially when, as in the instant case, such car is made readily accessible to them? Furthermore, it is

common experience that persons of a criminal nature frequent such "clubs" and "bars" in higher proportion than most other groups.

The driver in the instant case has lived in the Fairbanks vicinity long enough to be familiar with these facts. His failure to use ordinary prudence under the circumstances was inexcusable. He was allowing an otherwise harmless instrument to be put under the control of one who could not be expected to exhibit responsible conduct, whose normal physical and mental faculties were lacking. That he should fail to foresee the exact results as in fact they did occur, the death of an unsuspecting woman, is no excuse. Whether the taker be intoxicated or merely a sober thief, he could not expect that the vehicle would be driven other than in a negligent manner—the intoxicated driver because he did not have full control over his physical and mental faculties, the sober thief because of the expected anxiety to "get away" from the scene of his theft. Anyone who indulges in the use of intoxicants is a potential menace to the public safety as an automobile driver, *Crowell v. Duncan,* 50 A.L.R. 1425; 145 Va. 489.

Furthermore, the theory that one need not foresee the exact nature of the harm resulting from his negligence has become a popular doctrine in tort law as exemplified by those cases holding that where the owner furnishes an automobile to a person whom the owner knows, or from facts known to him should know, is likely to drive while intoxicated, the owner is liable for any injury which results as a proximate

consequence of the operation of the automobile by such person while intoxicated, *Petermann v. Gary,* 49 S.E. 2d 828; 218 Miss. 438; *Mitchell v. Churches,* 206 P. 6; 119 Wash. 547.

While the court might not feel, as the plaintiff contends, that this in fact is a situation in which reasonable men could not differ—that on finding such facts they would have to find negligence and with it the resulting proximate cause of the fatality to the plaintiff's decedent, still, the plaintiff maintains that at the very least it is a situation in which reasonable men might differ, and so must be submitted to a jury. The case law quoted above makes ample provision for such a ruling.

Should the court, however, feel that the ruling which the plaintiff seeks is inconsistent with existing case law, or that it would not be wholly consistent with it, thought should be given to expanding it. For here we have a dead mother—a former member of society, only so because the duties and care owing her by other members of society were negligently disregarded.

In *Wagner v. Arthur,* 134 N.E. 2d 409, Ct. Common Pleas, Ohio (1956), the court held the defendant not liable for the consequences of his acts in leaving his vehicle unattended, unlocked, and with the keys in the ignition, distinguishing *Garbo v. Walker,* supra, as there was no statute prohibiting such conduct. Significantly, the court concluded by saying:

> "The temptation was great to reach the opposite conclusion and to write philosophically on this question; to discuss man's industrial development

> from the manual to the simple tools era, to the mechanical-steam era, to the mechanical-electrical era, to the mechanical-electronic era and finally to the mechanical-atomic era; and thereby show society's benefit to each of its members; to show the duty and obligation of each, who enjoy society's benefits, to others in society; and to compare and present, by analogy, the theory of this plaintiff to that of the first plaintiff who succeeded in obtaining the engraftment of the doctrine of respondeat superior into our law. That temptation was set aside in favor of stare decisis, and to avoid too precipitous a change through an inferior court. *The theory now contended for by the plaintiff in this case will become law* some time either legislatively or judicially, and if by the latter process, it should be through the reviewing courts to whom the pioneer (the plaintiff) should appeal." (Emphasis added.)

If the court, then, is unable to decide this case within the framework of the present case law, and thereupon find such facts should be submitted to the jury, the plaintiff assumes the role of the "pioneer" in appealing this case to this Court of Appeals for what must eventually be a recognition of the legal duties owing the plaintiff's decedent in this case. The plaintiff cannot concede that such duties must be spelled out only by statute. The plaintiff fully subscribes to the sage philosophy expressed in *Ney v. Yellow Cab Co.,* supra, wherein the court states:

> "Justice requires that we do more than honor and respect prior judicial decisions, for if only these two considerations were our guideposts then the

path of jurisprudence would never change irrespective of a changing world."

Dated, Fairbanks, Alaska,
June 20, 1957.

Respectfully submitted,

ROBERT A. PARRISH,
Attorney for Appellant.

Nos. 15,374 and 15,464

United States Court of Appeals

For the Ninth Circuit

RICHARD E. BENNETT, Administrator of the Estate of Evelyn E. Bennett, Deceased, *Appellant*, vs. ARCTIC INSULATION, INC., and DELBERT E. BOYER, Agent, Acting Within the Scope of His Employment, *Appellees.*	No. 15,374
RICHARD E. BENNETT, *Appellant*, vs. ARCTIC INSULATION, INC., and DELBERT E. BOYER, *Appellees.*	No. 15,464

Consolidated Appeals from the United States District Court for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEES ARCTIC INSULATION, INC., AND DELBERT BOYER.

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BRIEF FOR APPELLEES ARCTIC INSULATION, INC., AND DELBERT BOYER.

PRELIMINARY STATEMENT.

Appellants, plaintiffs below, filed two actions against appellees, defendants below, in the United States Dis-

trict Court for the Territory of Alaska. One action was for wrongful death and the other for personal injury, both resulting from an automobile collision which occurred on October 3, 1954. Defendants moved to dismiss both complaints. Briefs were filed with the District Court, and the Court heard the oral arguments of counsel. On November 20, 1956, and February 8, 1957, the District Court entered orders dismissing the complaints for failure to state a claim upon which relief could be granted, and judgments were entered for defendants.

Plaintiffs have appealed to this Court from the orders and judgments entered against them. The two appeals, presenting the same question of law, have been consolidated for hearing before this Court.

As this case is before the Court to review the order granting the motion to dismiss, the question for the Court's determination is whether the complaint states a claim upon which relief can be granted.

For the purpose of testing the sufficiency of the complaint to state a claim, the facts alleged are of course deemed admitted and all reasonable inferences are drawn in plaintiffs' favor. In their brief (pp. 29-32), however, appellants have gone beyond the facts alleged in the complaint. They have recited "facts" not before the Court, and they have drawn inferences and conclusions from these "facts" which are not justified. Defendants take exception to plaintiffs' recitation of alleged facts, inferences, and evidentiary matters. Defendants submit that the sufficiency of the complaint must be tested on the facts that are alleged

therein and the reasonable inferences to be drawn therefrom.

The complaint alleges that defendants left an unattended vehicle, with keys in the ignition, in an area of nightclubs in the city of Fairbanks, Alaska. It alleges that defendants should have foreseen that the vehicle might be stolen and that plaintiffs might be damaged thereby. The complaint further alleges that a third person stole the vehicle, drove it negligently, struck the plaintiffs, and caused their injury. The question presented for the Court's decision is whether these allegations state a claim upon which relief may be granted.

Plaintiffs are, of course, attempting to state a negligence cause of action. The *duty* underlying a negligence cause of action must be found either in the common law or in statutes of the jurisdiction. Research has disclosed no statute of the Territory of Alaska or the City of Fairbanks which prohibits the leaving of a vehicle with the keys in the ignition. On page 19 of their brief, appellants concede that they have been unable to find such a statute. In absence of statute, therefore, any duty which defendants owed to plaintiffs under the facts alleged must be found in the common law.

Thus, the issue for the Court's determination is: Whether, in absence of an applicable statute, there is a cause of action against a person who left his vehicle with the keys in the ignition, where a thief steals the vehicle, drives it negligently, and injures plaintiffs.

Defendants submit that *as a matter of law* there is no such common law cause of action; and therefore, the District Court was correct in dismissing plaintiffs' complaint. This conclusion is compelled (1) by the case authorities which have considered the identical question now before this Court, and (2) by the reason, logic and justice underlying tort law.

In order to demonstrate that the District Court correctly dismissed the complaint, defendants (1) will show the Court the vast body of law consistent with the dismissal, and (2) will show the Court that such a result is consistent with reason, logic and justice. Defendants will conclude by analyzing plaintiffs' authorities and arguments, and showing wherein they fail to support plaintiffs' contentions.

AS A MATTER OF LAW, THERE IS NO CAUSE OF ACTION FOR LEAVING A VEHICLE WITH THE KEYS IN THE IGNITION, WHERE THE VEHICLE IS STOLEN AND THE THIEF DRIVES THE VEHICLE NEGLIGENTLY AND INJURES OTHER PERSONS.

A. The Great Weight of Authority Holds That There Is No Cause of Action as a Matter of Law.

There are no reported cases in the Territory of Alaska dealing with the facts here involved. There are, however, numerous cases from other jurisdictions precisely in point. In all of these cases the defendant had left an unattended vehicle with the keys in the ignition; a third person had stolen the car, driven it negligently, and injured the plaintiff. The following

cases hold *as a matter of law* that under these facts there is no cause of action:

Holder v. Reber, 304 P. 2d 204 (Cal. 1956);

Wagner v. Arthur, 143 N.E. 2d 409 (Ohio 1956);

Permenter v. Milner Chevrolet Co., 91 S. 2d 243 (Miss. 1956);

Casey v. Corson & Gruman Co., 221 F. 2d 51 (C.A.D.C. 1955);

Gower v. Lamb, 282 S.W. 2d 867 (Mo. 1955);

Richards v. Stanley, 271 P. 2d 23 (Cal. 1954);

Teague v. Pritchard, 279 S.W. 2d 706 (Tenn. 1954);

Kiste v. Red Cab, 106 N.E. 2d 395 (Ind. 1952);

Fulco v. City Ice Service, 59 S. 2d 198 (La. 1952);

Reti v. Vaniska Inc., 81 A. 2d 377 (N.J. 1951);

Saracco v. Lyttle, 78 A. 2d 288 (N.J. 1951);

Midkiff v. Watkins, 52 S. 2d 573 (La. 1951);

Anderson v. Theisen, 43 N.W. 2d 272 (Minn. 1950);

Lustbader v. Traders Delivery Co., 67 A. 2d 237 (Md. 1949);

Galbraith v. Levin, 81 N.E. 2d 560 (Mass. 1948);

Lotito v. Kyriacus, 74 N.Y.S. 2d 599, *affd.* 80 N.E. 2d 542 (1948);

Wannebo v. Gates, 34 N.W. 2d 695 (Minn. 1948);

Howard v. Swagart, 161 F. 2d 651 (C.A.D.C. 1947);

Ouellette v. Bethlehem-Hingham Shipyard, 73 N.E. 2d 592 (Mass. 1947);
Curtis v. Jacobson, 54 A. 2d 520 (Me. 1947);
Sullivan v. Griffin, 61 N.E. 2d 330 (Mass. 1945);
Wilson v. Harrington, 56 N.Y.S. 2d 157 (N.Y. 1945), *affd.* 65 N.E. 2d 101 (1946);
Walter v. Bond, 45 N.Y.S. 2d 378 (N.Y. 1943), *affd.* 54 N.E. 2d 691 (1944);
Castay v. Katz & Besthoff, 148 So. 76 (La. 1933);
Slater v. T. C. Baker Co., 158 N.E. 778 (Mass. 1927).

In holding that as a matter of law there is no cause of action, the above Courts differ in the reasons for their opinion. One group (e.g., *Richards v. Stanley, Midkiff v. Watkins*) states that the defendant owes *no duty* to the plaintiff under these circumstances, i.e., that the defendant, *as a matter of law,* is *not negligent* in leaving his keys in his vehicle. The other group (e.g., *Permenter v. Milner Chevrolet Co., Saracco v. Lyttle*) states that even if defendant might be negligent in leaving his vehicle with the keys in the ignition, his act is, *as a matter of law,* not the *proximate cause* of the harm to plaintiff, i.e., the acts of the thief constitute an intervening and superseding cause. But, regardless of the differing rationale for the decisions, the cases have the same holding: these facts state no cause of action.

Of the above cases two were decided in states within the Ninth Circuit: *Richards v. Stanley* and *Holder v. Reber.* The *Richards* case is an exhaustive treat-

ment of the subject. In affirming a nonsuit, the California Supreme Court there held that the defendant owed *no duty* to protect the plaintiff from the acts of a thief. The plaintiff presented the same argument to the Court that plaintiffs are here suggesting: that negligence in such a case is a jury question. The Court rejected this contention and stated that the imposition of a duty under the circumstances is for the Court, not the jury. And this conclusion was reached in the face of the very arguments (advanced by dissenting judges) that plaintiffs here assert.

On pp. 27-28 of their brief, plaintiffs contend that the *Richards* case was overruled by *Richardson v. Ham Bros. Construction Co.,* 285 P. 2d 276 (Cal. 1956). However, the *Richardson* case concerned different facts, which the Court distinguished from the *Richards v. Stanley* holding. The later California decision of *Holder v. Reber,* 304 P. 2d 204 (Cal. 1956), followed the decision of the *Richards* case, and, concerning its possible modification said (p. 206):

> "The conclusion seems irresistible that the principles enunciated in the *Richards* case have not been modified."

The holding of the above body of case law that there is no cause of action as a matter of law has also found support in the text authorities:

26 *Wis. Law Rev.* 740, 745 (1951):

> "Regardless of what one prefers for the reason for denial of liability (i.e., no negligence, not a cause in fact, or no recovery for policy reasons)

> it is submitted that the owner should not be responsible. Would the courts impose liability on the owner if the thief were not negligent but merely involved in the accident with the plaintiff? Is a thief presumed to be a reckless driver? Does it make a difference that a thief is driving a car that hits the plaintiff? Whatever the reason given it does not seem that legal liability should attach to the act of leaving the keys in the car. Whether the court stresses lack of negligence, finds no cause in fact, or uses limiting policy factors, *the plaintiff should not get to the jury.*" (Emphasis added.)

A similar opinion is expressed in 1 *St. Louis Univ. Law J.* 325 (1951).

Prosser, *On Torts* (2d Ed. 1955) comes to the same conclusion. In discussing whether or not a defendant is obligated to foresee a third person injuring plaintiff, he states (pp. 141-142):

> "There is usually much less reason to anticipate acts which are malicious or criminal than those which are merely negligent. Under ordinary circumstances, it is not to be expected that anyone will intentionally . . . steal an automobile and run a man down with it."

And again, in discussing situations where the acts of a third person become a superseding cause, he states (pp. 275-276):

> "The same is true of those intentional or criminal acts against which no reasonable standard of care would require the defendant to be on his guard: . . . the theft of an automobile and running a man down with it . . ."

In their brief, plaintiffs have cited some of the above cases and have attempted to distinguish them. The distinctions are not real. The authority cited above compels the conclusion that plaintiffs have failed to state facts sufficient to constitute a cause of action.

B. The Authorities Are Supported by Reason, Logic and Justice Underlying Tort Law.

The foregoing authorities exist not merely as compelling precedents; the logic and justice underlying their conclusions are easily demonstrated.

It is axiomatic that the law of negligence is based upon the standard of a *reasonable* man.

Placing upon defendants the burden for which plaintiffs argue, would substitute a *guarantor* for the "reasonable man." Plaintiffs are asking the Court to permit the imposition upon defendants of the duty to (1) foresee that there will be drunkards and thieves in a public place on a Sunday morning; (2) foresee that one of such persons will commit a felony and steal the truck; (3) foresee that such a person after stealing the truck will drive it negligently; and (4) foresee that such a person will proximately cause plaintiffs' injuries. Defendants contend that such extension of the principles of foreseeability is unwarranted.

Further, defendants submit that even if such a compounding of circumstances *might* be foreseen or anticipated, the risk created is not *unreasonable*. As Prosser states in regard to foreseeing the acts of third persons (pp. 269-270):

> "The same is true as to those intervening intentional or criminal acts which the defendant might reasonably anticipate, and against which he would be required to take precautions. It must be remembered that the mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant . . . Even though the intervening cause may be regarded as foreseeable, the *defendant is not liable unless his conduct has created or increased an unreasonable risk of harm through its intervention.*" (Emphasis added.)

See also *Richards v. Stanley,* supra, p. 26.

Defendants have not created or increased an *unreasonable* risk of harm. Even in leaving a vehicle where a thief might take it, there is little probability of harm to others. The dangers created are no more unreasonable than those incidental to the usual hazards of the road. Nor is defendants' act *unreasonable.* The leaving of keys in a truck is not an uncommon practice, particularly when the driver is making only a momentary departure, or is making a delivery, or has intentionally left the keys so that a third person might move the vehicle if necessary. Common experience shows that even the *inadvertent* leaving of keys in one's vehicle is not unusual. Such inadvertence is a relatively insignificant act when compared with the magnitude of the thief's acts and with the damage which plaintiffs are seeking to transfer to defendants.

Finally, it is a matter of common knowledge, and therefore of judicial notice, that automobiles may be started without keys; and that this is commonly done

by thieves. Removing the key does not insure against a theft.

Imposition of liability upon a vehicle owner in a case such as this would transcend negligence concepts and would go far in making the owner of a vehicle an *insurer* for all harms which his truck might cause. Such a severe liability has been rejected by the Courts (*Midkiff v. Watkins,* 52 S. 2d 573, 576 (La. 1951); *Curtis v. Jacobson,* 54 A. 2d 520 (Me. 1947); 1 *St. Louis Univ. Law. J.,* 325, 329 (1951)), and is indeed inconsistent with the basic concepts of the reasonable man, reasonable foreseeability, and unreasonable risks.

The authorities cited above, and the reason, logic and justice underlying their holdings, compel the conclusion that the facts alleged do not state a claim upon which relief can be granted.

PLAINTIFFS' AUTHORITIES AND ARGUMENTS FAIL TO SHOW THAT A CAUSE OF ACTION EXISTS.

Faced with the vast body of well-reasoned case law holding that there is no cause of action under the facts at bar, plaintiffs take the following courses of action: (A) They cite a number of decisions based upon different facts to induce a finding that they have stated a cause of action; (B) they present a variety of arguments in an attempt to convince the Court that it should not follow the established rule which destroys their position. We will now analyze plaintiffs' author-

ities and arguments, and will demonstrate that no basis is shown for a reversal of the trial Court's order.

A. Plaintiffs' Authorities Do Not Support Their Contention.

In an attempt to create a cause of action where the applicable authorities hold as a *matter of law* there is none, plaintiffs have cited a great number of cases. These cases are not applicable to the facts of this proceeding.

A number of plaintiffs' cases (pp. 5-12 of their brief) deal with *general* principles of tort law, rather than with principles of tort law applicable to the fact situation now before the Court. By and large, defendants concede the correctness of these decisions. But they are simply not applicable here.

Even those cases cited by plaintiffs which bear more closely on the facts before the Court (pp. 13-22) fail to support plaintiffs' contentions. They are distinguishable for several reasons:

(1) Some of plaintiffs' cases involve *violations of statutes* (*Garbo v. Walker,* 129 N.E. 2d 537 (Ohio 1955); *Ney v. Yellow Cab Co.,* 117 N.E. 2d 74 (Ill. 1954); *Ross v. Hartman,* 139 F. 2d 14 (C.A.D.C. 1943)). In these cases, a statute prohibited leaving a vehicle with the key in the ignition. The Courts found that the *statutes* imposed a civil duty upon the defendant, and that a violation of that duty constituted statutory negligence for which the plaintiff could recover. The *source* of the duty was the *statute.* Clearly such cases are not authority for the imposition

of a common law cause of action in the Territory of Alaska, where there is no such statutory duty.

(2) Some of plaintiffs' cases involve the acts of an *intermeddler,* rather than a thief. (*Lomano v. Ideal Towel Co.,* 51 A. 2d 888 (N.J. 1947); *Tierney v. New York Dugan Bros.,* 41 N.E. 2d 161 (N.Y. 1942); *Garis v. Cherling,* 71 S.W. 2d 215 (Tenn. 1934); and cases cited on p. 7 of appellants' brief.) That is, the third person was not a thief who committed a criminal act, but an intermeddler who accidentally set the vehicle in motion. There is a clear distinction between these cases. The negligent acts of an intermeddler are more readily foreseeable than the intentional acts of a thief. And the law may impose a greater duty upon the owner to foresee the possible negligence of an intermeddler than to foresee the wilful and malicious act of a criminal. *Richards v. Stanley,* supra; *Richardson v. Ham Bros. Construction Co.,* supra; *Gower v. Lamb,* supra; Prosser, *On Torts* (2d Ed. 1955), pp. 141-142. Because the acts of an intermeddler are more easily to be foreseen, such cases are not authority for a situation where the intervener was a wilful and malicious thief.

(3) Some of plaintiffs' cases are based upon liabilities other than leaving keys in a vehicle and the vehicle being stolen. In *Boland v. Love,* 222 F. 2d 27 (C.A.D.C. 1955) and *Morris v. Bolling,* 218 S.W. 2d 754 (Tenn. 1948), liability was predicated upon leaving the vehicles in the custody of persons known to be incompetent. The decision in *Maloney v. Kaplan,*

135 N.E. 838 (N.Y. 1922), was based upon negligence in improperly parking a car on a hill. And in *Lomano v. Ideal Towel Co.,* 51 A. 2d 888 (N.J. 1947), the defendant's negligence was in leaving his unattended vehicle in a place where *children* had tampered with vehicles on several prior occasions. The case at bar is one of leaving the keys in a truck where a third person steals the vehicle. Clearly the above cases are not authority for the imposition of liability under the facts of the instant case.

Plaintiffs have cited but one case which supports the proposition for which they are contending: *Schaff v. R. W. Claxton, Inc.,* 144 F. 2d 532 (C.A.D.C. 1944). This case holds that under the facts at bar the questions of negligence and cause are for the jury. Throughout the United States, it stands alone in the conclusion it reaches.

In the *Schaff* case, the defendant's driver left his truck in a parking space beside a restaurant. The driver left the truck unlocked and the keys in the ignition. An employee of the restaurant stole the truck, drove it negligently, and injured plaintiff. A directed verdict for the defendant was reversed on appeal, the Court holding that the questions of negligence and causation should be submitted to the trier of fact. The decision was two to one. The opinion of the majority was based upon a *dictum* in the case of *Ross v. Hartman,* supra, a case from the same jurisdiction which concerned a *statutory violation.* The dissenting justice contended that the Court's decision on appeal was

improper since the issue here had not been raised in the lower Court. The case was remanded to the trial Court, and the trial resulted in a verdict for the plaintiff. On appeal, the Court affirmed the lower Court's judgment, *R. W. Claxton, Inc. v. Schaff,* 169 F. 2d 303 (C.A.D.C. 1948). Again the decision was two to one. The dissenting justice argued that the decision was contrary to established law and that *Ross v. Hartman* was an improper authority upon which to base liability.

The *Schaff* case is wrong; it is contrary to all other cases on the point; it stands alone in its conclusion, and affords no sound reason for this Court to reverse the judgment of the District Court.

B. Plaintiffs' Arguments That This Court Should Not Follow the Majority Jurisdictions Are Unconvincing.

The overwhelming majority of counts which have considered the fact situation involved in the instant case have held that there is no cause of action as a matter of law. Plaintiffs have cited but one decision which supports their contention that negligence and cause are jury questions. Plaintiffs are therefore forced to argue that this Court should not follow the majority jurisdictions but should adopt the rule of the *Schaff* case. Several arguments are advanced in this attempt to dissuade the Court from following the clear weight of authority. Defendants will now consider these arguments:

(1) Plaintiffs argue (pp. 29-32 of their brief) that the area in which defendants' vehicle was left is one

frequented by drunkards, criminals, and other unsavory characters likely to steal trucks. They argue that this locale is *so different* from any involved in the other decisions that a different result is warranted.

Defendants wish to restate their objection that this part of plaintiffs' brief argues "facts" which are not before the Court and draws unjustified inferences and conclusions from these "facts." But even considering plaintiffs' "facts" on the merits, they do not warrant the adoption of a rule of law different from that recognized by virtually all jurisdictions which have considered the question at bar.

If Fairbanks is so different from other towns, undoubtedly the legislative authority would have passed a statute covering the facts of this case. The Court can hardly be asked to fix a purely local public policy which the legislature has not found to exist.

The cases cited in support of Appellees' position involved fact situations of infinite variety. Many involved situations *at least* as potentially inducive to theft as that alleged in this case, e.g., *Reti v. Vaniska, Inc.,* and *Walter v. Bond,* dealt with situations where persons actually *known* to be intoxicated were given the opportunity to steal the vehicles. And in *Castay v. Katz and Besthoff,* the vehicle was left in the City of New Orleans on the night of Mardi Gras. Is plaintiffs' alleged situation one of any more revelry and potential mischief than this setting? Other cases also involved the leaving of vehicles in areas where theft was likely. But in all these cases the result was the

same: no cause of action existed, as a matter of law. Even assuming for the purposes of argument that plaintiffs' "factual" inferences are justified, the situation alleged in their complaint and elaborated upon in their brief is not so different from those involved in the other cases to justify the adoption of a different rule of law.

(2) Plaintiffs argue (p. 29 of their brief) that reasonable minds have differed on the question of liability under the facts of this case; and therefore the issues of negligence and proximate cause should be submitted to the jury. However, reasonable minds have not differed. The overwhelming weight of authority (unanimous but for the *Schaff* decision discussed above), has held that there is no cause of action as a matter of law, and that there are no questions to be submitted to the trier of fact.

(3) Plaintiffs have made two references (pp. 25, 28) to the law of the "Federal decisions," apparently in an attempt to convince the Court that it is bound by the holding of the *Schaff* case, a decision of the Court of Appeals for the District of Columbia. However, it is settled that there is no Federal common law of torts, *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938), and the Federal Court sitting as the Territorial Court of Alaska is not bound by the precedents of the District of Columbia. *Jones v. United States,* 175 F. 2d 544 (9th Circ. 1949).

(4) Plaintiffs have quoted extensively (pp. 16-18, 22, 33-34 of their brief) from cases discussing the

increased complexity of civilization and the increased hazards of motor vehicles. From this they argue that more dangers are to be foreseen.

Even assuming that life may have become more complex and to a certain extent more hazardous, the shifting of these hazards to others must still be in conformity with law. And while more dangers might be foreseen from this increased complexity of life, reasonable foreseeability is still the basis for imposition of civil liability. In order to shift a burden of loss, the law requires some *reasonable* degree of foreseeability and the creation of some *unreasonable* risk. Defendants submit that even assuming life has become more complex, such a compounding of occurrences as is involved in the instant case is not reasonably to be foreseen, and that whatever risk might *possibly* be created the risk is not *unreasonable.*

Plaintiffs' argument loses its force in the face of the fact that of the twenty-five cases which have held that there is no cause of action as a matter of law, *twenty* were decided *within the last ten years.* Is life any more complex, or are the hazards any greater, in Alaska in 1954 than in California in 1956 (*Holder v. Reber,* New Jersey in 1951 (*Reti v. Vaniska, Inc.*), or New York in 1948 (*Lotito v. Kyriacus*)?

Two of the cases from which plaintiffs quote for their dissertation upon the complexity of modern life (*Ney v. Yellow Cab Co., Garbo v. Walker*) are jurisdictions where the *legislature* expressed the public policy of the state by passing statutory prohibitions against leaving unlocked vehicles.

Plaintiffs' argument does not reach the reasoning or the effect of the authorities directly contrary to their position.

(5) Plaintiffs twice make reference (pp. 32, 33) to the tragic results of the accident of October, 1954. Defendants are the first to concede that death and injury from the negligent driving of a thief are personal tragedies which invoke the sympathies of any human being. But sympathy is not a basis of liability; and it does not authorize the law to shift the burden of that tragedy to other persons. Responsibility requires the finding of a *duty* owed to the unfortunate sufferers; some breach of that duty; and a causal relationship between the breach and the harm. These elements do not exist here.

Plaintiffs' arguments that this Court should not follow the overwhelming weight of case authority, authority which has given detailed consideration to the questions presented, and which has held that there is no cause of action as a matter of law, are not convincing.

CONCLUSION.

The question presented for the Court's decision is: whether, in absence of an applicable statute, there is a cause of action against a person who left his vehicle with the keys in the ignition, where a thief steals the vehicle, drives it negligently, and injures plaintiffs.

This question has been litigated on many previous occasions. The virtually unanimous body of decisions

has held that *as a matter of law* there is no cause of action. Defendants submit that this body of law governs the instant case. Defendants do not simply rely upon the vast numerical superiority of the decisions in their behalf; defendants have shown the Court that the decisions are in accord with reason, logic and justice.

In the final analysis, plaintiffs are asking the Court to write new law. Plaintiffs are contending that this Court should ignore the great body of law which has decided that there is no cause of action as a matter of law, and should declare a rule of liability which has been consistently rejected. Plaintiffs speak of the Court "expanding" existing law (p. 33), and of themselves as "pioneers" (p. 34). The Court is asked to write new law extending the substantive rights between individuals. Such a departure from existing law, and such a creation of new rights and liabilities is the function of the legislature (*Richards v. Stanley,* supra, p. 28).

In effect, plaintiffs are asking this Court to shift the burden of tragedy from one innocent person to another. This, of course, is not proper. Any such transferring of burdens must be to the body politic as a whole, and requires legislative, not judicial action.

Defendants respectfully submit that under the facts alleged in plaintiffs' complaint, and the reasonable inferences to be drawn therefrom, there is *as a matter of law* no claim upon which relief can be granted. It is therefore respectfully submitted that the decision

of the District Court for the Territory of Alaska be affirmed.

Dated September 14, 1957.

Respectfully submitted,

KIRKE LA SHELLE
of BRONSON, BRONSON & MCKINNON,
CHARLES J. CLASBY,
MARY ALICE MILLER
of COLLINS & CLASBY,
Attorneys for Appellees
Arctic Insulation, Inc., and
Delbert E. Boyer.

No. 15376

United States
Court of Appeals
for the Ninth Circuit

JAY W. SELBY, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-14-57

No. 15376

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Plaintiff & Appellee.

In The United States District Court, Northern District of California, Southern Division

Criminal No. 35125

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAY W. SELBY, Defendant.

INDICTMENT

(Violation: Section 12(a), Universal Military Training & Service Act, 50 U.S.C. App. 462(a)—Refusal to Submit to Induction.)

The Grand Jury charges: That Jay W. Selby, defendant herein, being a male citizen of the age of 24 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948," as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act," hereinafter called "said Act," and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 66 of the Selective Service System in the City of Salinas, County of Monterey, State of California, which said Local Board No. 66 was duly created,

appointed and acting for the area of which the said defendant is a registrant, did, on or about the 1st day of November, 1955, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty in that he, the said defendant, having theretofore been duly classified in Class 1-A and having theretofore been duly ordered by his said Local Board No. 66 to report at Salinas, California, on the 1st day of November, 1955 for forwarding to an induction station for induction into the Armed Forces of the United States, and having so reported, and thereafter having been forwarded to an induction station, to-wit, in the City and County of San Francisco, did, on the 1st day of November, 1955, in the City and County of San Francisco, State and Northern District of California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act and the rules and regulations made pursuant thereto.

A True Bill.

/s/ RICHARD A. GICK,
Foreman.

/s/ LLOYD H. BURKE,
United States Attorney.

Approved as to Form:
/s/ J. H. RIORDAN, J.

[Bail $500.00—1-Count Indictment. Violation:—Sec. 12(a) Universal Military Training & Serv-

ice Act, 50 USC App. 462(a)—Refusal to Submit to induction. Penalty: Imprisonment not to exceed 5 years and/or fine not to exceed $10,000.]

[Endorsed]: Filed June 6, 1956.

[Title of District Court and Cause.]

MINUTES OF THE COURT

At A Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 27th day of August, in the year of our Lord one thousand nine hundred and fifty-six.

Present: The Honorable Michael J. Roche, District Judge.

This case came on this day for trial before the Court without a jury, jury having been waived in writing. Donald B. Constine, Esq., Assistant United States Attorney, was present on behalf of the United States. John Brill, Esq., appeared as attorney for defendant. Opening statements were made by respective counsel. Mr. Constine introduced in evidence and filed a certain exhibit which was marked U. S. Exhibit No. 1. Thereupon the Government rested. After a statement and a Motion for Judgment of Acquittal by counsel for defendant, the defendant rested. Mr. Constine introduced in evidence and filed another exhibit which was marked U. S. Exhibit No. 2.

After arguments by respective counsel, It Is Ad-

judged that the defendant Jay W. Selby is Guilty as charged in the indictment.

Ordered case continued to September 4, 1956, for hearing on motions and for sentence. Ordered that defendant may remain on bond heretofore posted.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 29 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, July 24, 1956.

/s/ JAY W. SELBY,
Defendant.
/s/ J. H. BRILL,
Attorney for Defendant.
/s/ R. H. FOSTER,
Assistant U. S. Attorney.

Approved:

LOUIS E. GOODMAN,
Judge, United States District Court, Northern District of California.

[Endorsed]: Filed July 24, 1956

In The United States District Court, Northern District of California, Southern Division

No. 35125

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAY W. SELBY, Defendant.

JUDGMENT AND COMMITMENT

On this 4th day of September, 1956 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of violation of Section 12(a), Universal Military Training & Service Act, 50 U.S.C. App. 462(a)—Refusal to Submit to Induction.

(Defendant Jay W. Selby did, on November 1, 1955, at San Francisco, California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States), as charged in the indictment (single count); and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby com-

mitted to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Examined by:

/s/ DONALD B. CONSTINE,
Assistant U. S. Attorney.

The Court recommends commitment to: an institution to be designated by U. S. Attorney General.

C. W. CALBREATH
Clerk

/s/ By F. R. PETTIGREW
Deputy Clerk

A True Copy. Certified this 5th day of October, 1956.

[Seal] C. W. CALBREATH,
Clerk.

/s/ By WM. J. FLINN,
Deputy Clerk.

Entered In Criminal Docket: 9/4/1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: J. W. Selby, 319 Elkhorn Road, Watsonville, California.

Name and address of appellant's attorney: J. H.

Brill, 1069 Mills Building, San Francisco 4, California.

Offense: Violation of Selective Service Training Act.

Judgment rendered September 4, 1956: Defendant found guilty. Sentence: Defendant to be committed to the custody of the Attorney General for a period of two years. Motion for bail pending appeal granted.

I, the above named appellant, by my attorney, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated: September 4, 1956.

/s/ J. H. BRILL,
Attorney for Appellant.

[Endorsed]: Filed Sept. 4, 1956.

[Title of District Court and Cause.]

POINTS UPON WHICH DEFENDANT WILL RELY PURSUANT TO RULE 17 (6); DESIGNATION OF RECORD MATERIAL TO CONSIDERATION

The points upon which defendant will rely in substance are:

1. The trial court committed error in rendering a judgment against defendant and in failing to acquit him.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The denial of the conscientious objector status by the local board and the board of appeal and the recommendation by the hearing officer of the Department of Justice and by the Department of Justice and board of appeal were without basis in fact, arbitrary, capricious and contrary to law.

4. The report of the hearing officer relied upon by the Department of Justice and the board of appeal is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and Regulations and advises the appeal board to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector.

5. The local board deprived the defendant of procedural due process of law by permitting prejudicial self-serving statements of others to be contained in the file in a manner not permitted by the Universal Military Training and Service Act or the federal regulations applicable thereto.

Defendant designates the following record which is material to the consideration of his appeal: All of the reporter's transcript, together with the exhibits received in evidence, the indictment, minutes of the court, waiver of jury, motion for judgment of acquittal, judgment and commitment and notice of appeal.

Respectfully submitted,

/s/ J. H. BRILL,

Attorney for Defendant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed Oct. 5, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and Exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal as designated by the attorneys for the appellant:

Indictment.

Minutes of the Court for August 27, 1956.

Judgment & Commitment.

Waiver of Jury Trial.

U. S. Exhibits #1 & 2.

Notice of Appeal.

Designation of Record & Points Pursuant to Rule 17 (6).

In Witness Whereof, I have hereunto set my hand and seal of said District Court, this 5th day of October, 1956.

[Seal] C. W. CALBREATH,
Clerk.
/s/ WM. J. FLINN,
Deputy Clerk

In The United States District Court, Northern District of California, Southern Division

No. 35,125

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAY W. SELBY, Defendant.

REPORTER'S TRANSCRIPT

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: Lloyd H. Burke, United States Attorney, by: Donald B. Constine, Esq. For the Defendant: John Brill, Esq.

August 27, 1956 [1]*

The Clerk: United States vs. Selby for trial.

Mr. Constine: Ready, your Honor.

Mr. Brill: Ready.

The Court: You may proceed.

Mr. Constine: May it please your Honor, this is a case in which the defendant was indicted on June 6 of 1956 for refusal to submit to induction. This is a Selective Service case, and the defendant claims he is a Jehovah's Witness.

Now, I might state that the indictment charges this defendant, a male citizen of the United States, 24 years of age, being a registrant of Local Board 66 in Salinas, California. The indictment charges

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

on November 1, 1955, of last year, having been classified 1-A by the Draft Board, this defendant in San Francisco refused to submit to induction. That is the charge.

Now, it is stipulated by counsel for the defendant and counsel for the Government that a copy, a certified copy of the Selective Service file, a certified photostatic copy of that file, may be introduced in evidence in place of the original file. Is that correct?

Mr. Brill: So stipulated.

Mr. Constine: It is also further stipulated that on November 1, 1955, at the San Francisco Armed Forces Induction Station this defendant refused to submit to induction after having the ceremony read to him twice. Is that correct? [3]

Mr. Brill: That is correct.

Mr. Constine: That will save the necessity of bringing in the military witnesses who will testify that the defendant did not step forward as ordered.

May it please Your Honor, may the Selective Service file then be marked, a photostatic copy, a certified photostatic copy of the Selective Service file of this registrant be marked Government's Exhibit 1 in evidence at this time?

The Court: It may be admitted and marked.

The Clerk: Government's Exhibit 1 admitted and filed in evidence.

(Whereupon the file referred to was admitted in evidence and marked Government's Exhibit 1.)

Mr. Constine: Now, may it please Your Honor,

as is customary in these cases, the Government wishes to review this file for Your Honor's benefit, calling Your Honor's attention to certain documents, and beforehand I have already marked by slips of paper the documents I will call to Your Honor's attention so that will save the necessity of looking for the index numbers, which are very difficult to find.

Now, may it please Your Honor, the first document, which should be the first sheet of paper in the file, the top document, is a registration card of this defendant. It is the very first page of the file, Your Honor, the registration card. I merely point that out to Your Honor inasmuch as it [4] shows that this defendant first registered on July 18, 1950, and that he indicates his birth date was February, 1932. Now, the document we wish to call to Your Honor's attention for examination I have numbered No. 1 and it is the classification of this defendant submitted to the Local Board in April of 1951. Mr. Brill, you have that document?

Now, Your Honor, on page 3 of the classification questionnaire that is the actual printed number on the questionnaire itself, page 3, Series 6, "Minister or student preparing for the ministry"—does Your Honor find that?

The Court: I have it.

Mr. Constine: I point that out to Your Honor that there is no claim whatsoever when this defendant first filed this questionnaire that he was a minister or a student preparing for the ministry.

I call to your attention, may it please Your

Honor, to page 7 of the questionnaire, of the same document, Series 14 at the top of page 7 in which there is no claim made that this defendant is conscientiously opposed to war. The defendant has not filled the particular series; that's on the top of page 7. There is no signature.

Now, Your Honor, I might state that following the filing of this questionnaire of April 30, 1951, this defendant was then classified 1-A. I might point also, may Your Honor please, in this questionnaire, on page 2 of the questionnaire, [5] the same document, in the middle of the page, at the time he filed the questionnaire this registrant stated he was presently a member of a reserve component of the Armed Forces, Seaman Recruit, in the Naval Reserve. And he states he entered into such component on April 3, 1951, and that he was performing service in such component by satisfactorily participating in schedule drills and training periods as prescribed by the Secretary of Defense. As I stated, Your Honor, on April 30, 1951, following the submission of this questionnaire, this defendant was then classified 1-A.

Now, the next document I wish to call to Your Honor's attention is the special conscientious objection questionnaire, which is No. 2 on the slip of paper that I have before Your Honor. I have little slips of paper sticking out of the top of the file, your Honor, and it would be No. 2.

Mr. Brill: What number in the file?

Mr. Constine: It's actually dated July 1, 1952. There are two series of numbers, awfully difficult to find. Your Honor have that?

The Court: I have it.

Mr. Constine: This questionnaire is dated July, 1952, Your Honor, and page 2 of that questionnaire, the top of the page, Item No. 3, the defendant states in answer to the question, "Explain how, when and from whom or from what source you received training and acquired the belief which is the [6] basis for your claim," he states "Early in 1951 I was working away from home. When returning we had a Bible study in our own home and attend meetings at the Kingdom Hall located in Watsonville where I learned the truth of God's word, the Bible." I merely point that out to Your Honor, that is during the same period he was a member of the Naval Reserve.

May I call to Your Honor's attention the next document I have numbered for Your Honor's benefit, No. 3, which is the hearing before the Local Board of August 11, 1952. I have numbered that No. 3 in Your Honor's file.

Now, on the last page of that—I should say on the next to the last page of that hearing before the Local Board on August 11, 1952, the defendant stated that he would only accept a minister's classification and would not accept the conscientious objector's classification from Selective Service. I might say that on the same date of this hearing, August 11, 1952, this defendant was classified 1-A by his Local Board.

The next document I wish to call to Your Honor's attention is numbered in Your Honor's file as No. 4, that's the slip of paper from the top of the file,

No. 4, which is a letter dated September 30, 1952, from the defendant to the Local Board. Your Honor, the concluding paragraph of this letter is as follows:——

(Colloquy between counsel, inaudible to the reporter.) [7]

Mr. Constine: He states: "Because I am a law-abiding citizen of this country I wish to pursue the orderly course of accepted procedure in matters of vital consequence. I therefore request a personal appearance before your Board so that I may offer affidavits and other valid reasons for possible reclassification of my status from 1-A to 1-AO."

Now, I might point out to Your Honor at this time, that is, September 30, 1952, the defendant states he would be willing to accept a non-combatant position in the United States Army. Here he is not objecting to service, but he is objecting to combatant service, and this was on September 30, 1952. I might state that following a hearing he was continued in Class 1-A on November 3, 1952.

Now, the next document I wish to call to Your Honor's attention is the document I have numbered No. 5, which is——

Mr. Brill: What is the date of that?

Mr. Constine: This is dated January 8, 1953, and it is an appeal of the defendant to the Appeal Board from his classification of 1-A. I merely point this out to Your Honor's attention for this reason: a registrant is given 10 days to appeal from the Local Board's classification. This in January of

1953 was far beyond his 10-day limit. However, because of an honest error on his part he did not receive his classification and therefore he was permitted to appeal even though it was beyond the 10 days. I merely point that [8] out to Your Honor's attention, that he was permitted to appeal although beyond the 10-day period.

Now, may it please Your Honor, I wish to call to Your Honor's attention a document that I have numbered in Your Honor's file as No. 6, which is a memorandum dated March 20, 1953, by the Local Board. It is a memorandum of the Local Board dated March 20, 1953; for the record at this time I wish to read this document specifically into the record. It states as follows:

"Mr. and Mrs. E. Knauss of Santa Cruz were in the office today and were very much incensed over the fact that Jay W. Selby is not in the service. Mr. Knauss has one boy in Korea and another one which was 18 last February. Both boys, however, are in the National Guard.

These people stated that out of all the boys called for physical induction at the time of their own son are now in the service with the exception of Selby. (That is the school class in which they all went to school together.) Jay Selby too was in the National Guard; went in the same day as this man's son and they were both asked whether they were 'conscientious objectors.' Both answered 'no.' Whereupon both were allowed to join the National Guard. However, when it became time for induction, young Selby said he wasn't going. He was going to join the

church of 'Jehovah's Witnesses' [9] and be smart. He was going to work and make a lot of money like some people did in World War 2. He wasn't going to be a fool.

Mr. Knauss said Selby has a good job, drives a big car and brags about the fact he isn't in the service and won't be; about the money he is making, etc. Neighbors are getting more incensed by the day as their children are having to go, and Mr. Knauss said they are saying that Selby has an 'in' with the Board members and that is why he is not in the Army. The Knauss boys are registered with the Santa Cruz Board No. 59. Mr. and Mrs. Knauss do admit that Selby goes to church but that he could be a chaplain in the service if he won't fight, and that he should be in the service, and that he and the neighbors are 'good and sore about it' ".

Now, the next document I wish to call to Your Honor's attention is the document I have numbered No. 7, which is the recommendation of the Department of Justice to the Appeal Board dated May 13, 1953. That's the first recommendation of the Department of Justice, Mr. Brill. That's the document I have numbered No. 7 in Your Honor's file.

I would like to call to Your Honor's attention the last page of that recommendation, rather, I should say the second page of that recommendation, and read it into the record as [10] follows:

"The registrant bears a good reputation in the community but few of the persons interviewed believe that the registrant's conscientious objector claim is made in good faith. Most persons were of

the opinion that the registrant joined the Jehovah's Witnesses because he did not want to go into military service. The registrant's references stated that they thought he was sincere. One of the registrant's neighbors and two teachers stated that they thought he would be sincere. However, they did not know he was a Jehovah's Witness, had not observed any religious activity on the part of the registrant, and had not discussed military service with him."

This paragraph is the important one, Your Honor.

"The Hearing Officer was of the opinion that the registrant had failed to sustain his conscientious objector claim."

The letter goes on:

"The views expressed by the registrant in his S.S.S. Form No. 150, which are set forth above, are consistent with the published views of the Jehovah's Witnesses sect. The registrant states that he is not a pacifist. The sect has defined pacifism as 'opposition to war or to the use of military force for any purpose.' It is [11] clear that the registrant is not opposed to war in any form, and he is, therefore, not entitled to exemption . . . "

And it goes on to find that it is recommended that:

"It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and non-combatant training and service be not sustained."

I might point out to Your Honor that the Hearing Officer at that time was Ernest E. Williams, who is still the Hearing Officer of this District.

I might state that following this recommendation

the defendant was placed in Class 1-A by the Appeal Board. He was ordered for induction on July 15, 1953, and he refused induction and was indicted back in 1953.

Mr. Brill: Excuse me, counsel. You said the Hearing Officer was Ernest E. Williams. I don't see that appears anywhere.

Mr. Constine: Yes, the very first paragraph of the letter," . . . was given to the registrant by Hon. Ernest E. Williams, Hearing Officer . . . "

Mr. Brill: Oh, I see.

Mr. Constine: May it please Your Honor, I wish to call to your attention the document I have numbered No. 8, which is a letter dated January 14, 1954, addressed to the Local Board from the Office of the United States Attorney. [12] It indicates that the defendant Selby before United States District Judge O. D. Hamlin on January 13, 1954, was acquitted of the first charge of refusal to submit to induction.

In that connection, Your Honor, I wish to call Your Honor's attention to the next document, which would be document No. 9 in Your Honor's file. I have it marked No. 9 with a little slip of paper.

The Court: Selective Service System?

Mr. Constine: Yes, that's correct, Your Honor, from Major Ferrill to the Selective Service System, a letter dated January 28, 1954, in which the Local Board is informed that the letter from the two neighbors complaining about Selby's activities was not considered by the Local Board. It was forwarded to the Appeal Board after the matter was

considered and therefore, it was the belief of Selective Service that this defendant apparently was denied his rights under due process, and that resulted in the acquittal before Judge Hamlin. Therefore, I might state from this letter on we then commenced the entire reclassification system again. The defendant then starts anew.

On September 13, 1954, he was classified 1-A. On October 11, 1954, he was classified 1-A, and I will call Your Honor's attention to document No. 10 now, which is a letter from the registrant dated October 16, 1954, advising the Local Board that he disagrees with their classification in [13] 1-A and he is appealing the classification. So I might state to Your Honor this is now the commencement of the second appeal of this registrant.

The Court: October the 18th?

Mr. Constine: October the 16th. Yes, it was received by the Local Board on October 18, 1954. And that is the commencement of the second appeal of this registrant.

Now, the next document I wish to call to Your Honor's attention is a document that I have numbered No. 11, which is the recommendation of the Department of Justice, dated June 7, 1955, received by the Appeal Board June 13, 1955. In the first paragraph of the letter it is indicated as follows:

The Court: The date?

Mr. Constine: The date is June 7, 1955, that is the date of the letter. It was received by the Appeal Board June 13, 1955. It is Your Honor's No. 11.

The Court: June 7.

Mr. Constine: '55.

The Court: Proceed.

Mr. Constine:

"As required by Section 6(j) of the Universal Military Training and Service Act, an inquiry was made by the Department of Justice in the above-mentioned case and an opportunity to be heard on his claim for [14] exemption as a conscientious objector was given to the registrant by Hon. Ernest E. Williams, a Hearing Officer for the Department of Justice."

I might state, Your Honor, that this is the same Hearing Officer that heard the defendant the first time.

I wish to read from page 2, now, after a brief history of this defendant is stated on page 1.

"The registrant appeared personally for his hearing accompanied by his father."

I might state, your Honor, at this time and at the time of this hearing an F.B.I. investigation was made and under the regulations today the registrant is given a resume of that F.B.I. report and it is actually attached to this letter so the defendant will be advised of what others may say about him so he is in a position to protect his interests.

"He made several objections concerning the resume of the investigative report. He stated that although a majority of the former employees opined that he was insincere and was trying to evade the draft, it was not necessary for him to evade the draft because he was in the Naval Reserve. He stated that

subsequently, the Navy gave him an Honorable Discharge because of his religious beliefs."

I might state the paragraph at the bottom of the page:

"The registrant testified that during 1954, he 'pioneered' in Jehovah's Witnesses ministry for about two months. He contended that he was [15] unable to serve a longer period of time as a 'pioneer' because it was necessary for him to make a secular living. He stated his ambition in life is to become a 'Pioneer Minister' and earn a livelihood by part-time work. He stated that because of his religious training and belief, he could not engage in noncombatant military service, such as hospital corps. He stated that he has dedicated his life to Jehovah, and that any type of military service would be inimical to his principles. He told the Hearing Officer that if he were classified 1-O . . ." Now, that is the conscientious objector classification. "He told the Hearing Officer that if he were classified 1-O, he would be unwilling to engage in civilian work for the Government, because to perform such a non-military service would be 'breaking his covenant with God and would be a compromise of his covenant.' He added that those Jehovah's Witnesses are not pacifists, they are opposed to war in any form and regard themselves as 'apart from the world and will have nothing to do with it, because the world is going to be destroyed.' "

Reading from page 3 now. He testified that during the past month he has devoted 12 hours to preaching and about eight additional hours to study

and preparation of religious talks. He concluded that currently he is the Stock Servant of his congregation, and also Area Study Conductor. [16] "The Hearing Officer noted that the registrant was given a hearing before himself on April 9, 1953, and it was recommended that he be classified 1-A. He also noted that on January 13, 1954, the registrant was tried and acquitted in the United States District Court in San Francisco, for violation of the Selective Service Act. He noted that it was his understanding that the registrant's acquittal was predicated upon a procedural technicality."

This is the portion I wish to call to your Honor's attention, the third paragraph on page 3:

"The Hearing Officer noted that the attitude of certain former employees was that the registrant was insincere in his claim as a conscientious objector. He concluded that the registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity. He further concluded that there is an absence of sincerity in the registrant's claim. Accordingly, he recommended that the claim of the registrant, based upon grounds of conscientious objection be not sustained."

And I might state the Department recommended that he be not given a conscientious objector's classification.

Now, on August 18, 1955, your Honor, following this recommendation, the defendant was classified 1-A by the Appeal Board. He was ordered for induction on October 21, and it [17] has been stipu-

lated that on November 1, 1955, he refused to be inducted into the Armed Forces of the United States.

That substantially, your Honor, based upon the recommendation of the Department of Justice, is the Government's case. We conclude that this defendant has been allotted every procedural right under the law, and appeals twice now, and the Hearing Officer found him to be insincere, there was basis in fact for his classification of 1-A.

Mr. Brill: We will introduce no evidence, your Honor. If the Government rests, we also would rest.

Mr. Constine: Excuse me. I am sorry, the Government rests following the introduction of that file as evidence, your Honor.

Mr. Brill: At this time the defendant wishes to present a motion for judgment of acquittal in this matter, and the defendant moves the Court for judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the Act and regulations by the defendant as charged in the indictment.

3. The undisputed evidence shows the defendant is not guilty as charged.

4. The denial of the conscientious objector status by [18] the Local Board and the Board of Appeal and the recommendation by the Hearing Officer of the Department of Justice and the Department of

Justice and the Board of Appeal were without basis in fact, arbitrary, capricious, and contrary to law.

5. The report of the Hearing Officer relied upon by the Department of Justice and the Board of Appeal is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and regulations and advises the Appeal Board to classify according to irrelevant and immaterial lines in determining the defendant was not a conscientious objector.

6. The undisputed evidence and the draft board records show that the Local Board deprived the defendant of his procedural rights and due process of law by permitting an unsolicited and malicious and obviously prejudiced and biased statement and letter to be contained in the file in a manner not authorized by law and in violation of the defendant's rights.

I have stated the motion for acquittal in chronological number and I will then review the matter in the same manner as it was reviewed by counsel for the Government.

The file, as indicated previously, indicates that the original questionnaire was filed on April 4, 1951, and at that time the file indicated that the day previous to the filing of the questionnaire, April 3, 1951, this boy registered with [19] the Naval Reserve.

It indicates further, and I am referring to the document No. 26, and I will find the page here. I must apologize to the Court; I didn't think of

preparing a slip index of the documents, although I should have because the numbers in the file are very confusing and I assume the reason for that is because this case has already been before court.

In any event, the file will disclose that after the defendant registered for the draft, which was the day after he joined the Naval Reserve, and on or about September 1, 1951, some six months later, the defendant, having previously thereto studied with the Jehovah's Witnesses, was baptized as a Jehovah's Witness on September 1, 1951.

The defendant's family contains 12 persons, 10 of whom I am informed, and the record will indidate, are Jehovah's Witnesses. His mother and father are Jehovah's Witnesses and had been long prior to the advent of this registrant having registered with the draft.

The file will further disclose, and I am referring now to document No. 24, the letter dated June 23, 1952, which was a letter sent to the draft board, which indicated that after he joined the Naval Reserve and became interested in religion, he found that he could no longer serve in the Naval Reserve and therefore applied for a discharge from the Naval Reserve. That is contained in a letter to the Local Board [20] dated June 23, 1952. He did receive an Honorable Discharge from the Naval Reserve after a hearing before them and that is indicated by several documents in the file, one of which is numbered 17.

The Court: Date?

Mr. Brill: March 6, 1952. That document is a

copy issued by Lt. A. T. Hughes, U. S. Naval Reserve, Assistant Enlisted Personnel Officer, and reading at the lower portion of the document, which is typed in, "He was discharged from the Naval Reserve on 6 March 1952 with Honor for reason of convenience of the Government (conscientious objector)." And giving the authority.

That matter is elaborated on extensively in a document numbered 211, and it is in the file dated October 11, 1954, as the date it was received by the Local Board. However, the original letter from the Department of the Navy, Bureau of Naval Personnel, is dated February 1, 1952. I should like to read a portion of this letter to the Court.

"Inspection of subject man's service record reveals that he enlisted in the U. S. Naval Reserve on 3 April 1951 to serve for a period of four years. It is further observed that when Selby voluntarily enlisted, he obligated himself to comply with and to be subject to such laws, regulations and Articles for the Government of the Navy as are or shall be established by Congress of the United [21] States or other competent authority. There exists no obligation on the part of the Navy Department to discharge Selby prior to the expiration of his contractual enlistment.

"However, the facts and circumstances of subject man's case have been considered by a Board of Officers appointed for that purpose. In view of the information submitted that Selby is apparently sincere in his religious convictions, objecting to combatant as well as non-combatant duty, the Board

recommended that his discharge by reason of convenience of the Government NOT recommended for re-enlistment be authorized. The Board's recommendation has been approved.

"Accordingly, it is directed that subject man be discharged for reason of convenience of the Government, NOT recommended for re-enlistment.

"It is requested that entries be made in subject man's service record and on the reverse side of his discharge certificate, showing reference (b) and (c) and this letter as authority for discharge. Please comply with the provisions of references (d) and (e), thereby insuring that subject man is NOT recommended for re-enlistment and that no entry of this action is made on the discharge certificate.

"It is further requested that the Director of [22] Selective Service of the State in which Selby will reside upon discharge be notified of his discharge from the U. S. Naval Reserve and the reasons therefor. A copy of this notification should be sent to the National Selective Service Headquarters, Washington, D. C."

In other words, the Navy discharged him after a Board hearing, finding that he was a sincere conscientious objector and the Navy itself recommended that he be not re-enlisted in the Armed Forces.

Following discharge from the Navy he filed a number of affidavits which are in the file, all supporting the fact that he had been following this religion conscientiously and faithfully and had been

a sincere member of the religious group from the time he was baptized in September, 1951.

This fact is also found in the resume made by the F.B.I. at the time of the second hearing and before Ernest Williams, the Hearing Officer, which I will refer to subsequently.

Now, we come to this so-called unsolicited letter from some people by the name of Knauss which counsel for the Government read to your Honor. It is dated March 20, 1953.

The regulations governing the manner in which evidence shall be obtained specifically provide for a procedure through which the defendant or the registrant may protect himself. Obviously the Draft Board is not a star chamber for any person who desires by malicious motives or vengeful motives [23] may go in and make a derogatory statement against a registrant without confronting the registrant or without giving the registrant an opportunity to cross examine, or in a manner not provided for by the regulations.

Now, the regulations say that the F.B.I. may go out and make an investigation, but with the knowledge that Congress had that the F.B.I. agents are men who are trained in taking statements and men who would sift and consider all of the statements they would take, but to permit a person to walk in off the street into a Local Board and to make a scurrilous statement against a registrant and then to have this statement typed up and contained in a file is not within the purview of the regulations and the Act itself.

Now, here we have people who obviously were vengeful. Their two sons had gone into the service, and they go into the Draft Board and they say they are very much incensed over the fact that this boy has not been taken into the service. Mr. Knauss has one boy who is in Korea and another one who was 18 last February. Both boys, however, are in the National Guard.

"These people stated that of all the boys called for physical induction at the time of their son are now in the service with the exception of Selby."

These are statements which are unverified. There is no statement they were present when all of the persons originally [24] were inducted, there is no statement that they were present at any time. These are merely statements of persons who obviously were incensed, made with a malicious motive to see that another boy in the block, or in the city, went in because their two boys went in.

They further make statements that when this man's son and Selby were sworn into the National Guard they were both asked whether or not they were conscientious objectors, and both answered "no". It's obvious on its face that this man's statement is untrustworthy because there is nothing in the file which would indicate that either boy went into the National Guard. The facts are that Selby went into the Naval Reserve, which is not the National Guard. However, the statements which are made by a person who is under an emotional strain and stress, such as the Knauss people, are obviously not to be trustworthy in any respect.

It went on to say.

"However, when it became time for induction, young Selby said he wasn't going."

No statement as to when he said it, where he said it, in whose presence he said it, or if in fact he did say it.

"He was going to join the church 'Jehovah's Witnesses' and be smart. He was going to work and make a lot of money like some people did in World War II. He wasn't going to be a fool." [25]

No statement as to when these statements were made, to whom they were made, whether in fact they were made. These are statements which were made by an incensed person who was mad because another boy was not put in the service and their two boys were.

"Mr. Knauss says Selby has a good job, drives a big car and brags about the fact that he isn't in the service and won't be; about the money he is making, etc. Neighbors are getting more incensed by the day as their children are having to go and Mr. Knauss says they are saying that Selby has an 'in' with the Board members and that is why he is not in the Army."

Again, statements made by an incensed, evil-intended person to a Draft Board in order to incense the Draft Board to take him in, referring to some connivance with the Draft Board.

But on top of all of this, Mr. and Mrs. Knauss admit that Selby does go to church, but that he could be a chaplain in the service if he won't fight,

but that he should be in the service, and that he and his neighbors are good and sore about it.

If one statement such as this were allowed to be contained in a file, which obviously must have had some effect upon the Local Board and upon the Appeal Board and upon the Hearing Officer, then hundreds of statements such as this, [26] then we are avoiding, we are doing away with the regulations and orderly procedure and we are having a star chamber proceeding where any person can go in and make any sort of statement, untested, unverified, and have that statement as a basis for conviction of a crime such as is being done here.

The Court: What is the date of that letter?

Mr. Brill: That letter was dated March 20, 1953.

The Court: On the trial of this case in another department, that didn't go before the Judge, did it?

Mr. Constine: Yes, your Honor, it was the reason for that letter that he was acquitted the first time before Judge Hamlin. That's what Judge Hamlin stated, that letter was never considered by the Local Board and went to the Appeal Board. For that reason he was acquitted and that's why we are back the second time giving him an opportunity to answer all the charges and be given his full hearing the second time. That was what counsel was arguing, the reason for his first acquittal.

Mr. Brill: And that letter should have been removed from the file instead of being allowed to be contained in the file.

The Court: I think counsel will admit that.

Mr. Brill: It wasn't removed from the file, it is still in the file and still considered by the Board.

Mr. Constine: Still in the file, but since that time [27] the defendant has had an opportunity, he has been given a full hearing before the Department of Justice, all the charges were explained to him, he had an F.B.I. investigation, and there is no indication that the Appeal Board this time, or the Local Board, has considered this; this is part of the old case.

Now, in the first place, your Honor, there is abundant evidence in this case that he is a 1-A classification and in no way prejudiced by this letter because he had the opportunity himself to appear, to present his side and the Hearing Officer found he was insincere by his conversations with this defendant. That was the basis for his classification.

Mr. Brill: I am informed, your Honor, that Judge Hamlin ordered that this letter—there are two letters—be stricken from the file and taken out of the file as having been obtained outside the authority of the draft procedure. However, it was not; it was used; it was taken to the Appeal Board again, it was considered by everyone; it became part of the file, it was never stricken from the file. As was stated, he was tried before Judge Hamlin.

The Court: Did you appear at that trial?

Mr. Brill: No, your Honor, I did not; another counsel did. However, I have discussed the matter with him.

The Court: The reason I inquire, I am going to ask you some questions. Proceed. [28]

Mr. Brill: Now, we come to the resume of the F.B.I. which was made in accordance with the regulations to be used by the Hearing Officer on the second hearing that was made. No. 230 is the number and it is dated June 13, 1955.

"The registrant"—and this is the F.B.I. report, the resume of their findings—"graduated from Watsonville Union High School in June, 1950. Former instructors had no knowledge of the registrant's religious beliefs or his conscientious-objector claim but advised that the registrant was a person of good character and they believed he would be sincere in his statements.

"The registrant was employed by the Pringle Tractor Company at Watsonville from April 19, 1950 to April 15, 1952. Several persons who were associated with the registrant during this employment, including fellow employees and superiors, advised that they doubt the sincerity of the registrant's claim as a conscientious objector."

In that regard, if the Court please, there have been numerous Circuit Court of Appeal cases, and some in the Supreme Court of the United States which hold that there must be legitimate grounds for a basis in fact and hearsay opinion statements are the same as no statements unless the opinion is predicated upon a subjective finding which can be verified. Hearsay and opinions of persons as to why he did or did not claim to be a conscientious objector to them or what their [29] opinion was is not material; it's not a legitimate basis.

"A supervisor advised that he asked the regis-

trant about his draft status shortly after he was hired and the registrant advised him he was safe for about a year as he was a member of the Naval Reserve."

Now, we go back to April 19, 1950, the time when he first joined the Naval Reserve. So that that statement is a true statement.

"Later the registrant told the supervisor that he was a conscientious objector and would not be called up for service."

This also is verified by the fact because after he joined the Naval Reserve he later was discharged from them and found to be a conscientious objector by the Naval Board.

"One fellow employee stated that when he learned that the registrant was claiming to be a conscientious objector he was very much surprised. He stated that the registrant had never indicated his objections and was a member of the Naval Reserve. The interviewee also advised that the registrant's older brother had been in the Armed Forces. He noted that the registrant joined the Jehovah's Witnesses some time after he had joined the Reserves and prior to the time he was due to be drafted. He stated he did not feel that the registrant was sincere in his objections as they seemed to [30] be too new and preceded too closely his imminent induction into the Armed Forces. Several other persons gave much the same information."

Nothing contained in that file is anything but the rankest type of opinion and hearsay and not based upon fact.

"From April 1952 to October 1952, the registrant was employed at Farmers Cooperative as a parts man. An official of the Cooperative advised that he was somewhat surprised to learn from another employee that the registrant was a conscientious objector as nothing about him would indicate that such was the case. He stated that he did not feel that the registrant was sincere because he appeared to have acquired his objections shortly before he would be drafted."

Here again they are basing their opinion upon the close proximity to the time when he was drafted. That matter was gone into by the Ninth Circuit Court of Appeals in the Dave Schumann case in which the Circuit Court held that mere suspicion or closeness between the time he became a Jehovah's Witness or a minister and the time he was to be drafted could not be the basis, suspicion could not be the basis for classification. I have the Schumann case here, and I am reading from the opinion: "We could find no affirmative evidence which controverts Schumann's claim. There are only the suspicious raised by the fact that Schumann did not begin [31] his religious studies until after he had registered for the draft and by the fact that he had not sought exemption until after the Korean War broke out.

As the Supreme Court has stated, when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary

to the spirit of the Act and foreign to our concepts of justice." And that referring to the famous Dickinson vs. the United States, a case which also arose in this District.

The Schumann case, incidentally, reversed the District Court and on the basis as I have just read.

The Court: What District Court?

Mr. Brill: In this circuit, Judge Monroe Friedman tried it.

The Court: I thought it was myself, that is the reason I inquired. Proceed.

Mr. Brill: I tried this case myself and also handled the appeal.

"Another person connected with the Cooperative stated that the registrant never expressed himself as to religion or the military service. He advised that he had no way of knowing the sincerity of the registrant's objections. A fellow employee stated that one day he asked the registrant about his draft status and the [32] registrant replied, 'I'm not worried about the draft because I'm a conscientious objector.' The interviewee stated that this remark sounded to him like the registrant was using this status as an 'out' to escape the draft and he did not feel that the registrant was conscientiously opposed to military service but that he just did not want to go into the service and would use this as a means to evade it."

Again, mere suspicion and opinion of this man.

"From November 1952 to approximately June 13, 1954, the registrant was employed by the Townsend Electric Company. A person connected with this

company advised that the registrant was discharged because it was learned that he had bought an interest in a gas station and was leaving his work at the Townsend Electric Company to work at the gas station. The interviewee stated that the registrant was earning a salary of approximately $450.00 a month. He further stated that he did not believe the registrant was sincere in his objections to military service inasmuch as it appeared to him that the registrant was an individual very much concerned with making money. He added that it was his opinion that the registrant was 'pretty much out for himself' ".

Again, pure speculation, suspicion.

"The registrant became a part-owner of the Selby [33] Service Station in June, 1954, but ceased being a part-owner in about August, 1954."

And I think this is very important as showing apparently what this boy actually was doing.

"The two registrant's partners are reputed to have asked the registrant to sell his interest in the service station to them because it was their belief that the registrant was not doing his share of the work. The registrant was not able to devote enough time to the service station to satisfy his partners because he was devoting considerable time to the work of the Jehovah's Witnesses, according to an interviewee."

In other words, he, when given the election between giving up his religion and giving up his business, he gave up his business in order to carry on his activities in his religion. So that that would viti-

ate all these statements that he was out for money and that he was penurious as some of these other persons had obviously stated.

"A neighbor advised that the registrant's parents, the registrant and his younger brother are Jehovah's Witnesses but she did not know that the registrant was a conscientious objector. She stated that the registrant's family enjoys an excellent reputation in the vicinity and that the registrant has been assisting in the support of his parents who are elderly. The [34] neighbor considers the registrant a fine, upstanding boy. She stated further that it would be her conclusion if the registrant has registered objections to military, that he would be sincere and that his objections would be based upon religious teachings. Another neighbor advised that registrant's parents are Jehovah's witnesses as are the registrant and his younger brother. He stated that an older brother served in the Army and is not a Witness. The neighbor stated that he could not feel that the registrant is sincere in his objections to military service but feels that the registrant is deliberately trying to 'evade service' ".

Again, merely opinion and suspicion.

"It was the neighbor's opinion that the registrant's mother is very much the dominating member of the family where religion is concerned and that she is counseling the boys. The neighbor stated that it has been his observation that the registrant drives a 1951 Pontiac and appears to be gainfully employed. He stated that it was difficult for him to understand how the registrant can spend as much

time as he does making money so that he can obtain material things when it is his claim that he is opposed to military training and service because of his religious convictions. The registrant's father is reputed to have lost his old-age pension because he was [35] working and did not declare his returns. An interviewee observed that if the family was sincere about their religious teachings, the father could not conscientiously cheat on his old-age pension and the interviewee felt that every member of the family knew what was going on."

It will be observed that before the Hearing Officer this was denied. Now, if this was a fact, the F.B.I. could have gone to the old-age pension department for the State or Federal and ascertained as a fact instead of taking the statement of an interviewee and containing it in here in an attempt to reflect upon this registrant. However, nothing appears in the file except the denial before the Hearing Officer that this is a fact.

"The School Servant and Record Clerk of the Watchtower Bible and Tract Society, Brooklyn, New York, advised from records that the registrant was ordained into the Jehovah's Witnesses as a minister on September 2, 1951, and became a Pioneer on September 1, 1954. However, upon the registrant's request, his Pioneer appointment was terminated on November 1, 1954. In September, 1954, the registrant devoted 106 hours to the Witnessing work of the sect and in October, 1954, he devoted 88 hours to Witnessing activities. Since November 27, 1953, the registrant has been serving as Stock

Servant with the Jehovah's Witnesses congregation at Watsonville. [36]

"The registrant's brother, who is the assistant congregational Servant of the Jehovah's Witnesses Kingdom Hall at Watsonville, made available the registrant's publisher's record which reflects that during the year 1949 the registrant devoted a total of 7 hours to the Witnessing work of the sect. The record reflected no Witnessing activity during 1950, nor during the first six months of 1951. From July through December, 1951, the registrant devoted a total of 27 hours to Witnessing activities. The registrant devoted some time to Witnessing activities during each month of 1952, and during that year devoted a total of 75 hours to Witnessing activities. During 1953 the registrant also devoted some time each month to Witnessing work, and the total time devoted to such activities was 72 hours. During 1954, in addition to the time devoted to Pioneering activities in September and October, the registrant devoted an additional 78 hours during the year to ministerial duties.

"References generally advised that the registrant has been reared in the Jehovah's Witnesses faith and they believe he is sincere in his religious beliefs and in his objection to military service. The registrant is reputed to be engaged in the construction of a church of another denomination at the present time and hence is not able to devote as much time to Witnessing [37] activities as previously.

"An acquaintance of the registrant advised that the registrant actually encouraged him and another

boy to enlist in the Naval Reserves. The interviewee recalled that in April, 1951, the registrant accompanied him when he went to enlist in the Reserves. He recalled that there was one question on the Naval Reserve application which asked the applicant to state whether or not he was opposed to armed service or was a conscientious objector. The interviewee stated that the registrant answered that question in the negative. The registrant agreed to attend two weeks' training in the Naval Reserves but did not appear for the training. The interviewee was of the opinion that the registrant did not want to leave a good-paying job and for that reason failed to appear for the training. The interviewee stated that after the training period was over, the registrant advised him that he would rather go to jail than go into the Army. The interviewee advised that it is his personal opinion that the registrant is out for himself and is primarily interested in earning money."

Here again we have opinion and conclusion.

"The registrant was arrested on August 20, 1953, for refusal to submit to induction. At that time the registrant stated that he joined the Naval Reserves at the [38] insistence of friends who were also in the Naval Reserve. He stated that he was not opposed to military service in April, 1951, when he joined the Reserve, but had been opposed since June, 1951.

"Records of the United States Naval Reserves, De Lavea Park reflect that the registrant was received by the Naval Reserves on April 3, 1951, and

was dropped from the rolls on July 26, 1951, for 'lack of attendance' ".

Now, after that last statement the record is definite in this file, there being several statements by the Naval Reserve itself, that the reason he was dropped from the roll is after a hearing before a Naval Reserve Board in which they found him to be a sincere conscientious objector and that he was not dropped from the rolls, not taken from the rolls of the Naval Reserve because of a lack of attendance. The inference, of course, is that a reflection upon the registrant and the defendant is attendant in this resume rather than a declaration of the true facts.

After this resume the Department of Justice held a hearing, and here again the Department of Justice on June 13, 1951—the Hearing Officer states at the bottom of the page 2 in this last report he added that "* * * though Jehovah's Witnesses are not pacifists, they are opposed to war in any [39] form and regard themselves as 'apart from the world and will have nothing to do with it, because the world is going to be destroyed' ".

There have been innumerable decisions, both in this circuit and in other circuits, and it is almost—well, it is now the law that the mere fact that a man is not a pacifist does not prevent him from being a conscientious objector.

If your Honor wishes cases on that, I am sure your Honor is familiar with them; your Honor has had a number of these cases before him, and I can certainly supply them.

The rest of the report is merely a reflection of the suspicions and the innuendos but not based upon the facts whatsoever. The Hearing Officer noted that the attitude of certain employees was that the registrant was insincere. Attitude itself is mere speculation, mere suspicion and is not a factual matter upon which the Board may predicate a finding such as made here.

Then in conclusion, he concluded that the registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity.

The file is complete. There is a conscientious objective form. The file is complete with affidavits and which support the fact that he is a member of this sect, that he is conscientiously opposed to participation in war. This boy submitted himself twice to be imprisoned; once when he [40] insisted upon a release from the Naval Reserve, which the Reserve was not under an obligation to give him, and if he refused to serve he could have been court-martialled before the Naval Reserve; and once when he submitted himself to this court, that is, a department of this court, and subjected himself to a possible prison incarceration; and again at this time.

Now, what other form of proving sincerity there is I don't know and what the Hearing Officer was looking for in this case I don't know. There is no tangible and what is called legitimate evidence to predicate a basis in fact for a 1-A classification in this case.

Counsel, when he was arguing the matter, pointed

out to the Court that at some time or another the registrant had asked for a ministerial classification and said he wouldn't take a 1-O classification. There have been a number of decisions—I don't believe in this circuit—but in other circuits that it is the duty of the Draft Board to place the registrant in his proper classification. His personal desires are of no moment. The regulations provide that if in fact a man is a conscientious objector, the mere fact that he says he wants to be a minister and not a conscientious objector doesn't in any way change the fact that the Draft Board and the Appeal Board must place him in a conscientious objector classification if they find that that is the fact and [41] that is the class in which he is to be put.

These boys are not represented by counsel. These cases are not to be handled and considered as though the registrant and the defendants are represented by counsel. It is for that reason that Congress in its wisdom regulated this matter and provided that the Draft Board and the Appeals Boards shall place the boy in his proper classification and that he may not waive that right merely by saying "I don't want to be a conscientious objector, I want to be a minister." It is the duty of the Boards themselves to do it.

In closing I wish to point out that now that we have a rather large body of law on the question of these cases, involving these cases and the courts are no longer rubber stamps for the action of the Appeal Board or for the Hearing Officer, the courts have an obligation to search the file and if there is

no basis in fact, but merely, as the Schumann case says, "speculation and suspicion," then it is the court's duty to find that there is no basis in fact unless it be actually shown to the court, and we submit that in this matter the defendant should be acquitted as he was in the previous trial, if for no other reason than there is contained in this file some evidence which got into the file erroneously in the first place and was never removed and is prejudicial to the defendant.

(Short recess.) [42]

Mr. Constine: Your Honor, I have a few comments to make to the Court, if I may, in closing.

The Court: Just a moment.

Mr. Constine: Yes, sir.

The Court: Did I understand you submitted your case?

Mr. Brill: Yes, your Honor.

The Court: Now, have you submitted your case?

Mr. Constine: Yes, your Honor. These comments are in the form of closing argument to counsel's argument, yes, sir. We have no other evidence to present. I understand the defendant does not wish to take the stand and the defense is submitting their case on the record.

The Court: Then the case is submitted on both sides?

Mr. Constine: Yes, your Honor. May it please your Honor, I merely wish to answer some of the comments of counsel because I think they require answering.

So far as this man's Naval Reserve status was

concerned, the Navy found that his activities did not entitle him to Reserve status and they discharged him honorably. Now, in the reports that are in the file it is stated that the Navy did not believe he was a fit subject to re-enlist. Now, the right to re-enlist is a privilege, your Honor. It is not the same as being drafted. The Navy did not say this man should not be subject to draft, they said, so far as the Navy is concerned, he should not be entitled to re-enlist because [43] the re-enlistment voluntarily entitles the person to certain privileges that the drafting of an individual does not entitle him to. And he was discharged for reasons of convenience to the Government. He received an Honorable Discharge. There is no indication what kind of a hearing the Navy held except this defendant's own statement that he was religiously opposed to being in the service, opposed to war, and he received his discharge, and they notified Selective Service of that fact so that orderly processes of selective service then could commence.

Now this defendant, I will point out to your Honor, today is not a Pioneer Minister nor was he a Pioneer Minister when he appeared before the Hearing Officer. That was in 1954. He has given up those duties of over a hundred hours a month. He no longer performs the services of a minister of the congregation of Jehovah's Witnesses, and if this defendant is sincere——

The Court: Where is the testimony as to that?

Mr. Constine: That is in the Hearing Officer's report, your Honor, based on what the defendant

stated at the time, and based on counsel's argument. I shall read that to you for the record.

"The registrant testified that during 1954,"——

The Court: What was the date?

Mr. Constine: This is the date of June 7, 1955, just [44] prior to his classification. This is the report of the Department of Justice, of Mr. Williams, and it states on page 2 of this report as follows:

"The registrant testified that during 1954, he 'Pioneered' in Jehovah's Witnesses ministry for about two months."

The "Pioneer" is the status of serving over 100 hours a month.

"He contended that he was unable to serve a longer period of time as a 'Pioneer' because it was necessary for him to make a secular living. He stated his ambition in life is to become a 'Pioneer Minister' and earn a living by part-time work. He stated that because of his religious training and belief, he could not engage in non-combatant military service,"—he says that now although previously he said he would be willing to accept that kind of a classification.

"He stated that he has dedicated his life to Jehovah, and that any type of military service would be inimical to his principles."

Now, and this is important, your Honor: "He told the Hearing Officer"—Mr. Williams—"that if he were classified 1-O"—that is, if he were to receive a conscientious objector classification, if it were given to him—"he would be unwilling to en-

gage in civilian work for the government, because to [45] perform such a non-military service would be 'breaking his covenant with God and would be a compromise of his covenant.'"

He says further that he would not even be willing to accept civilian work in lieu of induction.

Now, your Honor, there are some very significant things in this file which I again wish to call to your attention. But first I would like to say this: This resume that counsel has referred to, the F.B.I. report, he said it contains hearsay. It does; it contains both hearsay favorable to the defendant and unfavorable to him. That is because the regulations provide that the Government shall conduct an inquiry and this inquiry is into the defendant's sincerity, his beliefs and his reputation in the community, and therefore, the F.B.I. doesn't give an opinion; it merely states what it finds from interviewing these individuals. A copy of that resume is given to the defendant before he ever appears before the Hearing Officer. This is a new procedure so that he cannot claim the Hearing Officer has something in his possession that he does not have. After he is given the resume he then appears before the Hearing Officer and the Hearing Officer conducts the hearing. This defendant appeared as well as his father with the documents that the Hearing Officer had in his possession.

May it please your Honor, I would like to state this: Back in April of 1951 this defendant was in the Naval Reserve. [46] He then is classified 1-A. Within a short period after that classification, he

then becomes a Jehovah's Witness opposed to war in any form, although just two months previous he was willing to serve in the Naval Reserve of this Nation.

On his conscientious objector questionnaire, which was submitted in 1951, he is asked this question: "Have you ever been a member of any military organization or establishment, etc.?" He says this: "Early in 1951, along with some school buddies, I joined in the Naval Reserve at Santa Cruz because it seemed the only thing to do."

I merely point that out to your Honor, the only thing to do at that time was to prevent himself from going in the service. But he found a better thing, and that was to become a member of the sect of Jehovah's Witnesses.

I would like to read again the opinion of the Hearing Officer, which counsel did not read to your Honor. This is again in the letter of June 7, 1955, to the Appeal Headquarters.

"The Hearing Officer noted that the attitude of certain former employees was that the registrant was insincere in his claim as a conscientious objector." And this is the important thing.

"He concluded that the registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity. He further concluded that there is an absence of sincerity [47] in the registrant's claim."

That is the opinion of Mr. Williams, one man's opinion, but he is the Hearing Officer and it is his function to make an opinion, to give an opinion

after a full hearing as to whether he believes the man was sincere or not.

Counsel has stated to your Honor that that sincerity, that attitude cannot be considered by the Hearing Officer as a standard.

I might state to your Honor the Supreme Court of the United States has held contrary, as well as the Circuit Court for the Ninth Circuit in two very recent cases, which I must cite to your Honor at this time. This is the law in the Ninth Circuit. Certiorari has been denied by the Supreme Court. The case is White vs. the United States, 215 Fed. 2d 782, decided by the United States Court of Appeal for the Ninth Circuit, September 14, 1954, and I wish to read from page 785 of that opinion in discussing whether a man is sincere or not is the standard upon which to classify.

"* * * the Local Board initially, and the Appeal Board subsequently, were called upon to evaluate a mental attitude and a belief. It is plain that when such matters are to be determined and passed upon, the attitude and demeanor of the person in question is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant, and as [48] to the extent and quality of his beliefs. The Local Board, before whom the registrant appeared, had an opportunity surpassing that available to us or the Appeal Board itself to determine and judge as to these matters."

This case held, your Honor, the White case, that the Local Board, if they found the defendant was insincere, that was a proper standard upon which

to deny the conscientious objector claim. But we have a later case that goes even further. I might say that certiorari was denied in this White case by the Supreme Court.

But the leading case in the United States today, may it please your Honor, is Tomlinson vs. the United States, 216 Fed. 2d 12, again decided in the Ninth Circuit on September 15, 1954. The opinion was written by Judge Pope; Stephens, Bone and Pope were the Judges presiding. Certiorari in this case has now been denied by the Supreme Court. I would like to read from page 17 of that case, because we have the same situation here where the Hearing Officer found the defendant to be insincere, and the question is that a standard basis upon which to deny him a classification.

The Court: Would you be good enough to read the syllabus?

Mr. Constine: There is no point raised in the case, your Honor, as to—this was before the man was actually [49] given a complete written summary of both unfavorable and favorable material in the F.B.I. report. The case said that the summary given to this defendant in this case was sufficient. We don't have that issue here, because he has been given the complete summary now of both favorable and unfavorable material.

The Court: After a jury trial?

Mr. Constine: Well, this was after a court trial; the first time was a court trial and then the whole procedure started again and this time he was given

everything the F.B.I. had. This is what the case said:

"Action by Selective Service Appeal Board in classifying member of Jehovah's Witnesses in Class 1-A-O, as person available for non-combatant service,"—in this case they gave him a non-combatant service classification—"rather than in classification 1-O"—which is a full conscientious objector classification—

"as person opposed to both combatant and non-combatant service, was not without basis in fact."

"Objection on religious grounds to any assignment which would take registrant away from missionary activities, such as even fighting forest fires or building roads,"—this was a different case—"is not recognized * * *"

And then the case says this: [50]

"Report of Hearing Officer was properly made primary basis upon which Selective Service Appeal Board classified registrant."

And I think I should read that entire paragraph to you about the Hearing Officer's report.

"A Board or body called upon to determine to what extent and how far an individual's conscientious objections go, may well have great difficulty in coming to a conclusion."

Because the Board must figure out what's in the man's head.

"Surely the Board is not concluded by the mere assertion of the registrant."

And this is contrary to what counsel says, your Honor.

"Attitudes and demeanors which develop at the time of such a person's personal appearance may well be the controlling factors. In this instance it is plain that the Appeal Board's conclusion was based primarily upon the report of the Hearing Officer. Such a report may furnish the basis in fact which supports the Board's action. * * * Its conclusions may also have been based in part upon that portion of the registrant's file which was transmitted with the appeal."

In other words, the White case says sincerity is a test, and the Tomlinson case says the report of the Hearing Officer [51] finding lack of sincerity is and may be well the basis for the classification of 1-A. And I repeat again Mr. Williams found, he concluded that there was an absence of sincerity in the registrant's claim, and I think that is quite evident from the record in this case. When he first filed his questionnaire he made no claim of conscientious objection; he made no claim he was a minister; he was in the Naval Reserve. Within a few months after his classification of 1-A he then becomes a complete conscientious objector. He then becomes a minister, he claims. However, at the time of this indictment he had given up his ministerial duties. However, he goes on to say, this defendant, in his file, that even if the Board were to give him a 1-O classification, he wouldn't perform civilian work in lieu of induction.

Your Honor, this defendant's rights procedurally have been zealously protected by the District Court, by the Appeal Board and by the Local Board, and

it is the opinion of the Department of Justice, through its Hearing Officer, Mr. Williams, after a full hearing, that this defendant was not sincere. He was acquitted because of the procedural defect which has now been corrected. He has been given a complete copy of the F.B.I. resume, he has been given every right the Selective Service Board entitles him to, and it is not for this court to have a complete hearing again as to whether he is a conscientious objector; it is for your Honor to determine [52] whether he has been given his rights under due process and whether there was a basis for the Appeal Board's classification.

I might say there is substantial basis in fact for the man's classification as 1-A, and I cite in support of the Government's position the cases of White and Tomlinson vs. the United States in which certiorari has been denied. That's an accepted test today.

We will submit it, your Honor.

Mr. Brill: I want to point out to your Honor that counsel has meticulously avoided the issue of whether or not the documents which we referred to as the Knauss letter is properly in the file. I am of the opinion that that is a very important procedural matter which could not and is not and has not been corrected in any way. That scurrilous letter, maliciously intended, is still in the file, remained in the file and was seen by each of the officers and the courts who looked at the file on this second presentation.

Furthermore, I think that when your Honor reads

the White and Tomlinson cases, your Honor will find that what counsel maintains is not the law. If that were so, then the only thing that the Hearing Officer need state is that on such and such a date I had a hearing and I find that this man in insincere. If all that is necessary is the conclusion of the Hearing Officer, then why go through three pages or [53] four pages of findings in the matter?

The law doesn't provide that the Hearing Officer's conclusion is the basis in fact; there must be evidentiary basis in fact. As is said in the Sugurla case decided by the United States Supreme Court, there must be a legitimate basis in fact for a finding that a man is not a conscientious objector when he has made out a prima facie case and we submit that in this case there isn't one iota of legitimate evidence that can be called legitimate evidence in this file.

I wish further to point out that these statements or the innuendos made by counsel for the Government as to the finding of the Naval Reserve Board was not quite accurate. The Naval Reserve Board did not say that for the convenience of the Government this man is to be discharged. They said that we had a hearing before a Naval Board and we came to the conclusion, after evidence was presented, that this boy was a conscientious objector and therefore we give him an Honorable Discharge and we recommend that he not be re-enlisted in the Reserve or in the United States Armed Forces. That was the finding made back in 1952 after a hearing before the Naval Reserve Board.

We submit there should be a finding of not guilty in this matter, your Honor.

Mr. Constine: Your Honor, we can go on and argue this case until the afternoon. However, the cases speak for [54] themselves and as to the law, and we will submit it.

The Court: Well, you won't submit it at this time. This is a very unusual case. The cases do not disclose, if they do, I haven't run across any case where there is a jury trial and a jury verdict.

Mr. Constine: That is not the way it happened, your Honor. There was a court trial and a court decision.

The Court: Was it a jury trial or a court trial?

Mr. Brill: No, a court trial.

The Court: Did you present that case?

Mr. Constine: No, but I was present during——

The Court: Who presented that?

Mr. Constine: Mr. Foster, your Honor, but he was ordered for induction subsequent to the first trial. This is not the same order for induction.

The Court: I understand that fully. Another court tried this case.

Mr. Brill: That's right, your Honor.

The Court: And I want to begin at the point, if I have any conception of my duty here, we will begin this trial after that trial was concluded.

Mr. Constine: That is correct, your Honor.

The Court: And I will consider only the testimony from that date on in relation to this record.

Mr. Constine: That's right, your Honor. [55]

The Court: Now, then, I am going to be fully

advised, if I am in doubt. The law is sketchy here and we must reason it out, and we will take an adjournment until 2:00 o'clock and be prepared to argue, both sides, fully. I will try and dispose of it. Take an adjournment until 2:00 o'clock.

(Whereupon an adjournment was taken in these proceedings until 2:00 o'clock P.M. this date.)

Afternoon Session, Monday, August 27, 1956
2:00 O'Clock P.M.

Mr. Constine: Your Honor continued the matter for further argument until 2:00 o'clock. I suppose Mr. Brill has a statement to make to the court at this time. Do you have any further argument, Mr. Brill?

Mr. Brill: Yes, I have prepared something further in accordance with the Court's wishes.

The Court: Proceed.

Mr. Brill: This merely supplements, your Honor, the law that I furnished the Court this morning as to the sufficiency of the evidence in this case. This question has been determined in a case of the United States vs. Close, 215 Fed. 2d 439 in the Seventh Circuit in which the court had this to say:

"Nor do we believe that the F.B.I. report on this defendant furnished an evidentiary basis for the denial of the exemption claimed by the defendant. The F.B.I. report described interviews with various persons whose views varied as to the sincerity of the defendant's claim for exemption as a conscientious objector. But the reasons for the opinions expressed in the interviews were not shown. As

the Court said of such unsupported opinion in Annett vs. United States, 10 Cir, 205F2d 689, 691; 'to merely state that he does not consider him sincere [57] without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence'."

On the other point that the defendant waived his claim to a conscientious objector by saying he woudn't accept civilian work, the court in this same case had this to say:

"Nor do we find merit in the contention that the defendant abandoned his claim to conscientious objector status by appealing only on the denial to classification as a minister. As the court said in Pine vs. United States, 4 Cir., 212 F. 2d 93, 98 'it is absurd to assume that appellant intended to abandon his claim to exemption as a conscientious objector because he sought by his appeal the more complete exemption allowed ministers of religion * * *' Memorandum No. 41, issued November 30, 1951, by the Selective Service System Headquarters, as amended August 15, 1952, expressly provides that an appeal by a registrant solely on the basis that he is entitled to ministerial status does not constitute withdrawal of his claim as a conscientious objector. Jewell vs. United States, Sixth Circuit 208 Fed. 2d 770, 771."

This same question was raised in a case I just completed in the Southern District of California, Northern Division in Fresno before the very learned Judge Gilbert Jertberg. We had the same situation where a Hearing Officer concluded that con-

scientious objector claim had not been supported. I [58] am reading from the decision made by the court, the opinion rendered by the court.

"The Hearing Officer concluded that defendant's claim as a conscientious objector was not made in good faith. The crucial question in this case is the sincerity of the defendant in his claim that he is a conscientious objector. His objective acts can and must be considered in determining his sincerity. The transcript discloses that the defendant consistently claimed his status as a conscientious objector from his initial contact with the Local Board to the date of his indictment. The fact that some of his neighbors, school associates, fellow workmen and employers were not aware of his belief does not impune the integrity of his position or sincerity of his belief. The fact that he once stated he became interested in Jehovah's Witnesses in 1950 and on another occasion he stated his interest developed in 1951 and that later he stated that he was a member of the sect since childhood, does not impune the fact that he was a conscientious objector when he filed his claim for exemption on that ground with the Local Board on January 5, 1951.

"I have found nothing in the record incompatible with the defendant's claim that he is a conscientious objector and the court must find that the evidence [59] presented is insufficient to sustain a conviction."

This was decided August 13, 1956 in Criminal Case 3387 ND in the Southern District of California, Northern Division.

In this case, as well as the one at bar, neighbors and other persons made the claim to the F. B. I. that they doubted the sincerity of this boy because he became a Jehovah's Witness to avoid the draft. But those opinions, those statements unsupported by any objective facts are, by the case I have just cited, U.S. vs. Close and other cases that have been decided in the past, purely conclusions of the person and without support in fact and do not rise to the dignity of testimony.

Again I wish to reiterate that this matter was before Judge Hamlin who found this defendant not guilty. This matter was determined by the Naval Reserve Board, found this man to be a conscientious objector. There isn't one scintilla of evidence in the entire file which would in any way impune this boy's claim to be a conscientious objector. That being so, this Court must find that there is no basis in fact for the classification of 1-A and must find the defendant not guilty.

We submit the matter.

Mr. Constine: May it please your Honor, we have no quarrel with Mr. Brill's citations. They don't apply to the case at bar. Mr. Williams, in his report of the [60] Department of Justice does not rely solely upon any statements made by the witnesses contacted by the F.B.I., but relies on his own appraisal of this defendant following a personal interview of he and his father.

We have made no claim that this defendant has waived his rights because he will refuse to accept work, civilian work in the event the Board would

even give him a 1-O classification, but certainly his actions, his activities, his statements can be considered to be his intent and what his belief is.

Thirdly, the case cited by counsel in Fresno, the one he tried, the Judge stated, I just heard counsel read that the defendant had consistently maintained his position since his initial contact with Selective Service. From the initial contact of this registrant, your Honor, he made no claim he was a conscientious objector, he made no claim that he was a minister; he filed his classification questionnaire and said he was a member of the Naval Reserve. It was only after he was classified 1-A that he then embraced his parents' religion and he had been subjected to that religion for many years. But it was the 1-A classification which made him a Jehovah's Witness, he says. He admits that, and then he withdrew from the Naval Reserve. I think that fact alone can be considered to determine this man's insincerity and his integrity.

However, your Honor, I wish to point out a few things to [61] you. From the date of his second—from the date of his acquittal, what has transpired since the acquittal, so far as this man's record is concerned. Let's take from the time of his acquittal to the present. He has been afforded every procedural due right. He has had a second appeal, he has had a second hearing before Mr. Williams and he is found to be insincere.

Now, may I state this to you, your Honor. In his special form for conscientious objector, the written statement filed by this defendant after his first

acquittal and before the Appeal Board he says that "Explain how and when and from whom you have received your training." He says, "By having a Bible Study in our home from 1949 onward." He says he has received instructions from 1949 in his faith and yet in 1951 he joined the Naval Reserve. He had no scruples against engaging in the Armed Services at that time, but from the time he received his 1-A classification, that's when his scruples commenced, from the time he knew he was subjected to the draft, that's when he said he was opposed to being in the service.

May your Honor please, there is another interesting fact here; that he appeared before the Local Board, this is the second time now after the first acquittal, in October of 1954. At that time he states he is a Pioneer which means in the Jehovah Witness faith that he puts in over 100 hours of work a month. That is the ministerial classification among the Jehovah's Witnesses. At the time he appeared before the Board he is a Pioneer, but in November, 1954, following his personal appearance he gives that up, he no longer is a Pioneer. He uses that two-month period to appear before the Draft Board and then once he appears and says he is a Pioneer, he then withdraws from that particular activity and goes back to full-time employment, giving ten to twelve hours a month to his religion, which is not an unusual thing. Most people who follow any particular faith may well put in ten hours a month merely going to church, to whatever congregation they belong. So I might say

the Board has this to consider: that when he makes a personal appearance he is a Pioneer; the moment his personal appearance is over he drops his Pioneer activities.

The Court: Where is it indicated that he dropped that?

Mr. Constine: That is indicated, your Honor, in the June 7, 1955, report subsequent to this hearing.

The Court: What report?

Mr. Constine: Of the Department of Justice before Mr. Williams. Now, this is in June of 1955, and I'll read this for the record.

"The registrant testified that during 1954,"—the year before, and by the way, this is all subsequent to that first trial—"he 'Pioneered' in Jehovah's Witnesses [63] ministry for about two months. He contended that he was unable to serve a longer period of time as a 'Pioneer' because it was necessary for him to make a secular living."

In other words, he says he couldn't remain in that activity because he wanted to have a full-time living, make a full-time living, which I think most people want to do. But he goes on to say this: "He told the Hearing Officer that if he were classified 1-O"—if he received his conscientious objector classification now—"he would be unwilling to engage in civilian work for the government,"—he wouldn't take the work—"because to perform such a non-military service would be 'breaking his covenant * * *' ".

So what he says is this: I am not a minister, I am following full-time employment, but if you order

me to go to work instead of going in the Army, I won't go to work anyway because I don't want to give up my good job. I think based on that——

The Court: What job?

Mr. Constine: Well, he states here what his actual employment is. He was presently employed at that time as an apprentice carpenter, at the time that he appeared before Mr. Williams. And then again I will read this, I will read it for counsel's benefit. Mr. Williams says this:

"He concluded that the registrant has failed to sustain his claim as a genuine conscientious objector by [64] offering convincing proof as to his sincerity. He further concluded that there is an absence of sincerity in the registrant's claim."

And that, your Honor, is not a bare statement, unsupported by the record. That is supported by this defendant's activities from the very time he came in contact with the Selective Service.

Again I wish to cite to your Honor not the Seventh Circuit cases, but two cases recently decided in this District, in this Circuit, I should say, in which certiorari was denied by the Supreme Court. And contrary to what Mr. Brill says, the White case, White vs. the United States, holds that it is plain when such matters are to be determined and passed upon, that is, the attitude and the demeanor of a person in question, his attitude and demeanor is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant.

The Court: Let us pause there for a moment.

What does this record disclose in relation to his attiude and his demeanor?

Mr. Constine: Your Honor, that is evidenced by his actions.

The Court: What actions?

Mr. Constine: That when he first filed his questionnaire he made no claim of conscientious objection, he made no claim [65] he was opposed to military service, and he was in the Naval Reserve.

The Court: That is in 1951.

Mr. Constine: That's right.

The Court: Well, we are going back.

Mr. Constine: Well, your Honor, it is the entire record which indicates a man's conduct and actions. He has not taken the stand so we cannot question him. All we must rely on is the written record, and Mr. Williams said that from his contact with the man, following the full hearing with the man and his father, he was convinced the man wasn't sincere in his beliefs. That was Mr. Williams' subjective feeling.

The Court: Based on what?

Mr. Constine: On his appraisement of this man's character and demeanor when questioning him, your Honor.

The Court: Well, there is an absence of both in this record.

Mr. Constine: Now, your Honor, we don't believe there is. We believe from these various statements this defendant has filed concerning his conduct from the beginning——

The Court: All right, point it out.

Mr. Constine: Again I will refer to the fact that he made no claim of conscientious objector when he first registered.

The Court: In 1951. [66]

Mr. Constine: In 1951. After he registers he is in the Naval Reserve, classified 1-A, then he embraces the faith of his parents, although he said he had been subjected to that faith for years. He then states in a letter to the Board in 1952 that he would be willing to accept the non-combatant service. He then states after that, no, he wouldn't accept it, he wants a minister's classification, and for two months he serves as a minister in 1954 when he appears before the Local Board. When that local appearance is finished, then he gives up his minister's work and goes back to full secular employment.

I think all those activities of this defendant, coupled by the fact that Mr. Williams, in his hearing, and the man can only express what he feels when he listens to a witness, just like a jury, he either believes them or he doesn't; from the man's demeanor Mr. Williams says he believes this man is insincere and he has not sustained his proof.

There is no requirement that he sets forth his mental processes in a writing in that conclusion. He sets forth the whole man's history, he sets forth how he came to him, sets forth what the man's acquaintances have to say, and then he gives his evaluation.

The Court: That is Williams' report?

Mr. Constine: Yes, your Honor.

The Court: Read it in its entirety. I haven't seen it. [67]

Mr. Constine: All right.

Mr. Brill: I think the Court should be apprized that this is not Williams' report.

Mr. Constine: Oh, no. This Department of Justice letter is prepared almost verbatim from the report of Mr. Williams. It is word for word. If there is any question, I have Mr. Williams' report right in my office, and I will be happy to produce it now if there is any question about that.

Mr. Brill: Counsel, I was just asking you to point out to the Court that this is not Mr. Williams' report, this is signed by the Department of Justice.

Mr. Constine: That is correct, but it states almost verbatim, word for word, the report of the Hearing Officer.

The Court: That isn't the best evidence.

Mr. Constine: If counsel has no objection, I will get that report and produce it. I have got it right on my desk, because that is what this letter is based on, it says so.

The Court: That letter isn't the best evidence.

Mr. Constine: Your Honor, this is the letter that the regulations require they put in the file.

The Court: You are talking about the Williams report?

Mr. Constine: This is the letter that sets forth what is contained in Mr. Williams' report.

The Court: It isn't the best evidence; the original is the best evidence. [68]

Mr. Constine: I will get a copy of that report.

The original is in the Appeal Board, and we have a copy of that report in our office files, the report of Mr. Williams, which I will get in a matter of 30 seconds. I imagine counsel will object to my introducing that, because this is the only document permitted to be introduced. If counsel has no objection, I will get it.

Mr. Brill: I merely called to the Court's attention that counsel was, perhaps unintentionally, advising the Court that this is Mr. Williams' report when it was not Mr. Williams' report. We have no argument that there is a report issued by Mr. Williams to the Department of Justice. I haven't seen it. I don't know whether it is verbatim or not.

The Court: You want to see it?

Mr. Brill: I have no interest in the thing, really, because the regulations provide that the only evidence that can be produced before a court in order to convict this defendant is that which is contained in the file itself.

Mr. Constine: That's right.

Mr. Brill: We haven't seen Mr. Williams' report and we have no way of knowing anything about it. That burden is upon the Government.

The Court: I realize that.

Mr. Constine: And the regulations provide that it is the recommendation of the Department of Justice, based on the [69] Hearing Officer's report, that is placed in the file.

The Court: The answer to that is that under the rule it isn't the best evidence.

Mr. Constine: Well, it is the only evidence, your

Honor, that is permitted unless counsel will agree to permit me to put the actual report in, it is the same thing.

The Court: Get the report here.

Mr. Constine: Might we have a recess for a few moments so I can get a copy of the report?

The Court: Recess.

(Short recess.)

Mr. Constine: May it please your Honor, I have at this time a copy of the report of the Hearing Officer, Mr. Williams, which I stated states in substance what is contained in the Department of Justice letter. I understand counsel has no objection to the introduction of this document.

The Court: A copy?

Mr. Brill: Yes, your Honor.

Mr. Constine: May it be marked Government's Exhibit in evidence?

The Court: It may be admitted and marked.

The Clerk: Government's Exhibit 2 admitted and filed in evidence.

(Whereupon the report of Mr. Williams above referred to was admitted in evidence and marked Government's Exhibit 2.) [70]

Mr. Constine: May it please Your Honor, the first portion of this report contains the resume of the F.B.I. report that was given to counsel—rather, that was given to the defendant and that is contained in the Department of Justice letter. It's word for word, because it is the actual resume that was given to the defendant. If I may, I will read from the actual hearing and what took place before

Mr. Williams, which is in substance what is contained in our letter in the file.

"The registrant admitted receiving a copy of the resume, and made several objections thereto, which objections will be discussed later in the report.

"Hearing:

"Attention is invited to the fact that the registrant was given a hearing before this Hearing Officer on April 9, 1953. On that occasion it was recommended that the registrant be classified 1-A. On January 13, 1954, he was tried and acquitted in the United States District Court in San Francisco, for violation of the Selective Service Act. It is understood that his acquittal was predicated upon a procedural technicality."

The Court: Just a moment. What was that procedure?

Mr. Constine: That was the fact that that letter, rather, there was a memorandum of the report of this man's neighbors concerning the man's insincerity. That memorandum [71] was never considered by the Local Board but was forwarded to the Appeal Board, and under the regulations the Appeal Board should not have had anything before it, under the regulations, that the Local Board did not have. Therefore, he was acquitted because the Appeal Board had testimony of certain individuals that the Local Board had never considered when they classified the man 1-A, although from a practical point of view the defendant would not have benefited by that letter, certainly. Nevertheless, it

was not in accordance with the rules and regulations and he was not afforded his due process and Judge Hamlin acquitted him. This time there was nothing submitted to the Appeal Board that the Local Board did not have under the regulations.

The Court: Speaking of the regulations, to what are you referring?

Mr. Constine: Well, there is a procedure for taking an appeal and I might say that the entire record of the Local Board is forwarded to the Appeal Board. This time the Appeal Board received this document which had not been a part of the registrant's file as a point of time when the Local Board considered his classification. See, this document that, of course, counsel believes was quite prejudicial to the defendant which, in fact, it was, was never considerd by the Local Board. It came in after his hearing in point of time. He had been classified by then. [72]

The Court: The reason they didn't consider it was that it wasn't filed in time?

Mr. Constine: Well, it was not filed. It was just not filed, it was not filed in time, frankly, that's right.

The Court: What time elapsed, if you know?

Mr. Constine: Yes, I do. Now, this defendant was finally—there were a number of classifications, but his last classification by the Local Board was on November 3, 1952, when he was continued in 1-A. On January 8, 1953, he appealed. The file went to the Appeal Board. It was not until March 20 that

this memorandum was submitted to the Local Board. It was actually two months after the time the appeal commenced, so the Local Board never had it before it back in November of 1952. Therefore, it went up to the Appeal Board without going through the Local Board's proper channels, and according to Mr. Williams that was the reason for his acquittal. That was according to Selective Service, too, that the regulation, by the way, is set forth in here. I think we should read that for the record, too.

This, by the way, Your Honor, is on Your Honor's file, No. 9 in Your Honor's file. It's a letter from Selective Service to the Local Board. It's as follows:

"The case of subject registrant was recently tried in the Federal Court. Registrant was found not guilty. The court rendered no written opinion [73] in this case and reason for its findings was based upon a procedural error in the handling of the case.

"It seems that two memoranda"—an original and copy—"which were furnished by neighbors of registrant to the Local Board were forwarded to the Appeal Board after the case had been forwarded on appeal. There was no indication that the two memoranda received by the Appeal Board had been considered by the Local Board subsequent to the case being forwarded on appeal." Which is correct. I might state it hadn't been because it came in afterward.

"The failure of the Local Board to consider this

information is not in accordance with Section 1626.24(b) of Regulations.

"It is suggested that the Local Board reopen the case considering all information that the cover sheet now contains." And so forth.

So this did come in after the case had been forwarded on appeal. That is what Mr. Williams was talking about when he refers to the procedural error.

May I go on, Your Honor?

"The registrant personally appeared at his hearing on March 10, 1955, accompanied by his father who served as a witness. The following facts were adduced at the hearing: [74]

"The registrant made the following objections to the resume:"—In other words, he had been provided with the resume of the F.B.I. investigation, and he made these objections:

"He stated that although a majority of the former employees opined that he was insincere and was trying to evade the draft, it was not necessary for him to evade the draft inasmuch as he was in the Naval Reserve. Subsequently, the Navy gave him an Honorable Discharge because of his religious beliefs. He called attention to the fact that the resume stated that he was discharged from the Townsend Electric Company because he had purchased a part-ownership in a service station; and also, according to the informant, 'was an individual very much concerned with making money'. On the other hand, his partners in the service station, according to the

resume, objected that he was devoting too much time to his religious activities in the Jehovah's Witnesses. The registrant further objected that the resume was incorrect in that his father had not lost his pension rights. Additionally, he claimed that the resume was incorrect in that he had never encouraged another boy to enlist in the Naval Reserve. Other than the objections as above noted, the registrant expressed no opposition to the said resume. Incidentally, it is considered that the resume [75] is a fair and true reflection of the data contained in the registrant's file." And this is the issue that we were discussing previously——

"The registrant further informed that during 1954 he 'Pioneered' in the ministry of the Jehovah's Witnesses for a period of two months. He contended that he was unable to serve a longer period of time as a 'Pioneer Minister' because it was necessary for him to make a secular living."

That means this, Your Honor: A Pioneer is a Jehovah's Witness who serves over a hundred hours a month and by many courts a Pioneer is considered to be a minister within that religion. This defendant said he served for a period of two months back in 1954, but as of '55, the date of this hearing, he had not been serving as a Pioneer Minister.

"His ambition in life is to become a 'Pioneer Minister' and earn a livelihood by part-time work. At the present time he is serving as an apprentice carpenter. His current pay is $1.67 per hour." That was at the time of this hearing.

"He again advised that, because of his religious teachings and belief, he could not engage in non-combatant military service, such as the hospital corps. He informed that he has dedicated his life to Jehovah, and that any type of military service would be inimical to [76] his principles. He further informed that, if he were classified 1-O, he would be unwilling to engage in civilian work for the Government, because to perform such non-military service would be 'breaking his covenant with God and would be a compromise of his covenant'. He stated that although Jehovah's Witnesses are not pacifists, they are opposed to war in any form; that they regard themselves as 'apart from the world and will have nothing to do with it, because the world is going to be destroyed.'

"He further advised that during the past month he has devoted 12 hours to preaching and about eight additional hours to studying and preparation of religious talks. Currently he is Stock Servant of his congregation, and is also an Area Study Conductor.

"Conclusion:

"Attention is invited to the attitude of certain former employees who expressed the opinion that the registrant was insincere in his claim as a conscientious objector. It is true that the registrant has lived a clean and moral life. It is, however, the opinion of the Hearing Officer that he has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity.

"In light of the fact that it is felt that there [77] is an absence of sincerity to his claim, it is recommended that his claim be not sustained and that he be classified 1-A."

Now, that is the opinion of Mr. Williams after the hearing with this registrant.

I will merely say in closing, Your Honor, that this defendant's rights have been protected by the Local Board, by the Appeal Board and by the courts, that the procedural irregularity in the prior trial has now been corrected. He appeared before Mr. Williams, was given a full opportunity to present his witnesses, to present his case, and Mr. Williams did not believe in the defendant's sincerity, and that was his right. I think that is borne out by the record from the very initial contact of this registrant.

The Appeal Board was certainly justified in viewing his entire record with a careful eye. This registrant adopted the conscientious objection to war only after he had been classified 1-A, within two months or so, I believe—three months, and that during the period prior to his classification he had registered and was perfectly willing to be in the Naval Reserve.

Now, I can only state, Your Honor, that we have a defendant, who, in this case perhaps is a confused boy. I don't know. He admits he was not a minister today, but says that if he received a conscientious objector's [78] classification he wouldn't perform civilian work either. This defendant is subject to

the same laws as any citizen of the United States and this court is to determine whether he has been given his rights and due process and whether there was some basis for his classification of 1-A, whether or not the court would give such a classification.

I submit to Your Honor that the Government has proved its case beyond a reasonable doubt and will rely on the two leading cases in the Ninth Circuit.

The Court: Matter submitted?

Mr. Brill: Submitted, Your Honor.

The Court: Well, you understand on this record there is nothing the court can do but find this defendant guilty. I am bound and limited by this record. Therefore, I will enter judgment of guilty as charged.

Mr. Constine: I assume counsel will have some motions to make.

Mr. Brill: Yes, I would like to have this matter go over for judgment, if the Court please, and ask that the defendant be allowed to remain at liberty under bail.

The Court: I think we better dispose of it. What have you in mind?

Mr. Brill: I suggest the matter be put over one week, if counsel has no objections.

Mr. Constine: I have no objections, whatever [79] counsel and the Court desire. Do you intend to make a motion for probation, that it be referred to the Probation Officer?

Mr. Brill: No, we intend to appeal this matter, but I want to discuss the matter further with my client, Your Honor.

Mr. Constine: You wish one week for sentencing then?

Mr. Brill: Yes.

The Court: Very well, one week for judgment.

The Clerk: September 4, a week and a day.

Mr. Brill: September 4?

Mr. Constine: That will be on a Tuesday. This defendant is on $500.00 bail now.

Mr. Brill: We would ask he remain at liberty on bail, Your Honor, please.

Mr. Constine: We have no objection, Your Honor.

The Court: Very well, he may remain out on the same bail.

(Whereupon an adjournment was taken in these proceedings until September 4, 1956.) [80]

Morning Session, Tuesday, September 4, 1956, 10:00 O'clock A.M.

The Clerk: The United States vs. Selby for sentence.

Mr. Constine: May it please Your Honor, this is the case that proceeded to trial on August 27th before Your Honor for violation of Selective Service for refusal to submit to induction. The defendant was found guilty by Your Honor without a jury and the matter was continued to this date for judgment. No motion was made for probation and it is before Your Honor.

The Court: Is there anything you wish to say before sentence is passed?

The Defendant: Well, last week when we came into court I came into court feeling I was innocent and I still feel that way, Your Honor. There were a few things that happened last week that just for the record I think I would like to say. One of them is that the Government here stated that I had said was no longer a minister, and that certainly is not true for this day I still say I am a minister. He said my files indicate that I no longer was, but I certainly am.

Also, there was the accusation that I Pioneered full time ministry for the purpose of appearing before the Draft Board and I wish to tell you that I had no crystal ball to gaze into to know when the Draft Board was going to call me before that; that is all I have to say. [81]

The Court: Do you want to avail yourself of the opportunity of doing service for the Government aside from military service?

The Defendant: No, I do not. I am a minister. My life is already taken up in service.

The Court: There is other work that you can do that any minister would be glad to do.

The Defendant: I would not, Your Honor.

The Court: Very well. Is there anything further to say?

Mr. Constine: No, Your Honor.

Mr. Brill: I should like to make a statement, if I may, Your Honor. The issue here is whether or not this boy is a conscientious objector. The Draft Board claims he was not a conscientious objector,

so the issue here is not whether or not this boy would be willing to do any other kind of work. The issue is whether or not he was properly classified.

The Court: No, but the law provides that he has an opportunity, if he does not want to do military combat service, to do other types of service. There are other agencies that will be glad to have his assistance, hospitals and what not.

Mr. Brill: If he is classified as a conscientious objector that is true.

The Court: They so classified him. I think they did it legally. In any event, this record does not disclose. [82] He did not even take the stand on his own behalf.

Mr. Brill: I would like further to point out that this was the case in which the Naval Reserve Board found this boy to be a conscientious objector and therefore discharged him from the service. This case was tried once before. Judge Hamlin acquitted this boy, having found that he was improperly classified as 1-A.

The Court: This is a new record entirely, isn't it?

Mr. Brill: Yes, this is a new record, but it is the same issue involved. The file is just the same as it was when it went before Judge Hamlin.

The Court: We will have the representative of the Government explain that.

Mr. Constine: This is the case in which this boy was Classified 1-A the first time. He was acquitted by Judge Hamlin. It was my understanding he was

not afforded all his procedural rights. There were certain documents included that should not have been included; that he was not in the service, he was in the Naval Reserves, and when he asked to be released, he was released. This prosecution was commenced on a second violation. It was actually a new procedure. The Local Board found he was not a conscientious objector. They found him 1-A, and we had the trial before Your Honor and he was convicted on the basis of the record.

The Court: That was my understanding. [83] This is a new record entirely. You did not put in a scintilla of evidence to refute that, not a scintilla.

Mr. Brill: The record itself is the only evidence available to us in a draft case.

The Court: The petitioner himself did not take the stand.

Mr. Brill: That is correct.

The Court: In any event, are you ready for sentence now?

The Defendant: Yes.

The Court: It is the sentence of the court and the judgment of the law that you will be confined in a Federal Penitentiary for a period of two years. That is all.

Mr. Brill: At this time, your Honor, I should like to make a motion to allow this defendant to remain on bail pending appeal. An appeal will be taken in this case and prosecuted in good faith. There is a substantial question involved here and we argued the matter before your Honor. Your

Honor will recall that your Honor recessed the trial in the morning, stating from the bench that there was a question and you wanted further argument in the afternoon. The substantial question is this: The record will indicate that this boy persistently, conscientiously and continually claimed he was a conscientious objector from a period in 1951, and that claim was not in any way refuted by the record made by the Draft Board. The prosecuting attorney pointed out to [84] the court that the reason for this basis in fact of the Draft Board finding this boy 1-A was that he changed from a non-conscientious objector to a conscientious objector at a time when draft was imminent. I pointed out to your Honor that in a case tried in this District and taken up to the Circuit Court of Appeals in the Schumann case that that fact is only a suspicion and will not operate as a basis in fact, will not be considered as a basis in fact for a classification. The mere suspicion that he claimed a conscientious objector classification when his draft was imminent is not and has been held by other districts and other courts, it has been held not to be a sufficient basis in fact to deny his claim of conscientious objector.

This boy comes from a family of Jehovah's Witnesses. His father and mother have been Witnesses from some time in the early 1930's. There are 12 members of his family, ten of whom are Jehovah Witnesses. The attitude of the sect is well known, I think, in relation to their feeling toward the service in the Armed Forces. We feel that there is a sub-

stantial question in this case and we feel that an appeal will be successful, and we ask that your Honor allow this boy to remain free on bail pending appeal. I might point out that the F.B.I. report and the report made by the Hearing Officer in so many words discloses that this boy has led a good, moral life. There is no risk being run by the [85] Government in permitting him freedom on bail pending appeal.

Mr. Constine: If it please your Honor, there is no purpose in re-arguing the case this morning. We did that last week. We disagree with counsel and we question whether there is a substantial question on appeal. We, of course, feel that there is no substantial question, and on that basis we would recommend against the granting of bail on appeal. But I should say to your Honor that there has been a recent amendment of the Federal Rules of Criminal Procedure concerning bail on appeal. I do not have the rule with me now and I think we should have it before that decision is made. There was a rule that there would have to be a substantial question ordinarily before a man would be allowed bail on appeal. There is no substantial question, but nevertheless there has been an amendment to the rule in the last few months and I would like to get that rule before I make a statetment to your Honor concerning it. It will just take me a moment, if I might get the rule.

The Court: Very well, I will pass it.

(Thereupon a recess was taken, after which a determination of this question was made without the presence of the reporter.) [86]

[Endorsed]: Filed Feb. 11, 1957.

[Endorsed]: No. 15376. United States Court of Appeals for the Ninth Circuit. Jay W. Selby, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: October 5, 1956.

Docketed: December 7, 1956.

Reporter's Transcript filed: February 11, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15376

JAY W. SELBY, Appellant.

vs.

UNITED STATES OF AMERICA, Appellee,

POINTS UPON WHICH DEFENDANT WILL RELY PURSUANT TO RULE 17(6); DESIGNATION OF RECORD MATERIAL TO CONSIDERATION

We hereby adopt the Statement of Points and Designation of Record Material to Consideration filed in the District Court, thereby complying with Rule 17(6) of the Rules and Practice of this Court.

Dated: January 4, 1957.

Respectfully submitted,

/s/ J. H. BRILL,
Attorney for Defendant-
Appellant

Acknowledgment of Receipt of Copy attached.

[Endorsed]: Filed Jan. 9, 1957. Paul P. O'Brien, Clerk.

No. 15,376

United States Court of Appeals

For the Ninth Circuit

JAY W. SELBY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

JOHN H. BRILL,
625 Market Street, San Francisco 5, California,
Attorney for Appellant.

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No. 15,376

United States Court of Appeals

For the Ninth Circuit

JAY W. SELBY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division (7-8).*

The District Court made no findings of fact or conclusions of law. No opinion of the Court was rendered. The Court merely found the Appellant guilty as charged in the indictment (80). Title 18, Section 3231, United States Code, confers jurisdiction in the District Court over the prosecution of this case. The indictment charged an offense against the laws of the United States (3). This Court has jurisdiction of this

*Refer to pages in printed Transcript of Record.

appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The Notice of Appeal was filed within the time and in the manner required by law (8).

STATEMENT OF CASE.

The indictment charged the Appellant with a violation of Section 12(a), Universal Military Training and Service Act, 50 U. S. C. App. 462 (a). It was alleged that after registration and classification Defendant was required to report for induction and "did on the 1st day of November, 1955, in the City and County of San Francisco, State and Northern District of California, knowingly refuse to submit himself to induction and to be inducted into the Armed Forces of the United States as provided in the said act and the rules and regulations made pursuant thereto (3-4). The Appellant was arraigned. He pleaded "not guilty." Trial by jury was waived and he consented to trial by the Court (6). The case was called for trial on August 27, 1956. Evidence was received (12), and the cause taken under submission. A Motion for Judgment of Acquittal was made at the close of the evidence (26). There appears to be no ruling on the Motion in the record, however, the Defendant was found guilty (80). The Court sentenced the Appellant to two years in a Federal Penitentiary (7-8). Judgment and commitment were entered in the Court below, in accordance therewith. Notice of Appeal was duly and timely served (8).

Application was made for bail in the Trial Court pending appeal (84), which was granted. The Transcript of the Record, including statement of Points Relied On, has been filed (9-88).

SPECIFICATIONS OF ERROR.

The Trial Court erred in:

(1) Rendering a judgment against defendant and in failing to acquit him;

(2) Failing to find that the Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment;

(3) Failing to find that the denial of the conscientious objector status by the local board and the board of appeal and the recommendation by the hearing officer of the Department of Justice and board of appeal were without basis in fact, arbitrary, capricious and contrary to law;

(4) Failing to find the report of the hearing officer relied upon by the Department of Justice and the board of appeal is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and Regulations and advises the appeal board to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector.

QUESTIONS PRESENTED AND HOW RAISED.

The undisputed evidence showed appellant possessed conscientious objections to participation in both combatant and noncombatant military service. His objections are based upon his sincere belief in the Supreme Being. His obligations to the Supreme Being are superior to those owed to the government and are above those flowing from any human relations. His beliefs are not the results of political, philosophical, or sociological views but they are based solidly on the Word of God.

The local board classified Selby I-A. There was a Department of Justice hearing, following the completion of the investigation by the FBI, and the hearing officer made a recommendation to the Department of Justice on Selby's conscientious objector claim. The Assistant Attorney General made a final recommendation to the appeal board. The appeal board denied the conscientious objector status based upon the recommendation of the Department of Justice.

In the motion for judgment of acquittal appellant complained that the denial of the conscientious objector status by the appeal board was without basis in fact, arbitrary, capricious and contrary to law.

The question presented here, therefore, is whether such denial of the claim for classification as a conscientious objector was arbitrary, capricious and without basis in fact.

STATUTES INVOLVED.

Section 6(j) of the act (50 U. S. C. App. §456(j), 62 Stat. 609) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such persons shall be notified of the time and

place of such hearing. The Department of Justice shall after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of concientious objections."

FACTS.

Upon the commencement of the trial and by stipulation of the parties, a certified photostatic copy of the Selective Service File was offered in evidence as Plaintiff's "Exhibit I." The file contains a number of pages, each of which contains written numerals either with a circle around the number or a line underneath the number. Since a proper presentation of the facts requires reference to some of the pages in the Selective Service File, all references hereafter

shall refer to this file and the page number either circled or underlined in parenthesis.

Appellant registered, at the time, and in the manner required by law, with local board No. 66, Monterey County. (Page 1, circled.) He filed his classification questionnaire on April 17, 1951. (Page 4, circled). As indicated in the classification questionnaire, at the time of the filing of said questionnaire, Appellant was a seaman recruit in the Naval Reserve, having entered into such component on April 3, 1951. (Page 5, circled.) On March 6, 1952, registrant was discharged from the Naval Reserve for the reason he was found to be a conscientious objector. (Page 16, circled.) The file then contains two affidavits attesting to the fact that the Defendant was associated with Jehovah's Witnesses in Watsonville, California, from some time in June, 1951. (Page 22, circled and page 23, circled.) The file then indicates that the Defendant was ordained as a minister of Jehovah's Witnesses on September 1, 1951, at Santa Cruz, California. (Page 24, circled.) On July 1, 1952, the Defendant filed a special form for conscientious objectors in which he stated that his belief in a Supreme Being involved duties which, to him, were superior to those arising from any human relation. He further states that he was baptized and made his covenant with God on September 1st, 1951, at Santa Cruz; that he had given many public expressions of his beliefs, and he states that by reason of religious training and belief, he is conscientiously opposed to any participation in war in any form and

is conscientiously opposed to participation in noncombatant training or service in the Armed Forces. (Pages 29 through 32, circled.)

His file then contains a number of further affidavits attesting to the fact that the Defendant was conscientious in his religious activities and beliefs. (Pages 37, 38, 39, 40, 41, 42, 43, 44 and 45, circled.)

On August 11, 1952, the Defendant appeared before the local board for a personal hearing and a purported written transcript of the hearing is set forth in which numerous questions and answers appear. (Pages 46 to and including 49, circled.)

On page 48 a statement is made by one of the members of the local board as follows:

> "You realize, do you not, that Jehovah's Witness is not recognized as a minister?" (Page 48, circled.)

After a request, therefore, on November 3, 1952, the Defendant appeared for a personal appearance again before the local board. A short resume of the hearing is contained in the file and it appears that the Defendant stated that whereas when he appeared before he wished a minister's classification, he now would like a conscientious objector's classification, being classification I-O. (Page 63, circled.) The file then contains an affidavit, filed on behalf of the Defendant, in which it is set forth that the Defendant has six sisters and five brothers now living; that his entire family, with the exception of one sister and one brother, belong to the Jehovah's Witnesses. The

Defendant was graduated from Watsonville Union High School in June of 1950; that prior to his graduation he was employed on a part-time basis by the Pringle Tractor Company, and became a full time employee after his graduation. That during the summer of 1950, he was sent by Pringle to King City, California, to work in its agency there; that he returned each weekend to Watsonville to visit with his parents; that up until this time, his movements were those of most normal boys; that he had fun, worked, was good to his family, and enjoyed the company of his male companions and when his friends joined the Naval Reserve in Santa Cruz, California, on April 3, 1951, he, too, joined that Reserve; that while participating in the Reserve activities and working at the Pringle Tractor Company in King City he continued to return to his home in Watsonville on weekends; that as was their custom, his parents held nightly meetings in their home, devoted to prayer and to the teachings of their faith, known as Jehovah's Witnesses; that he was subjected to their teachings, and that he became deeply influenced by them; that, as a result of this indoctrination, he became a member of that faith in June of 1951; that he informed the officers of the Naval Reserve that he could not longer report for training because of his religious views and in July of 1951, the Naval Reserve transferred Selby to inactive duty. The Defendant's interest in the work of Jehovah's Witnesses grew and he continued to study the Bible and the works of his faith; that he became an ordained minister of the

faith on September 1, 1951, by the regular procedure of the faith, namely, that of baptism by immersion in water and the subsequent consecration of his life to the teachings of the word of God. That after a hearing by the Naval Board, including the questioning by the Chaplain and other Clergy, on his religious views, he did, on March 6, 1952, receive an Honorable Discharge, having been found to be a conscientious objector. (Pages 68 to 74, circled.) There then appears in the file, a summary of a statement taken unsolicited from a Mr. and Mrs. E. Knauss, of Santa Cruz, in which they claim they were much incensed over the fact that the Defendant is not in the service; that all the boys who were in the same school class together with the Defendant were now in the Service except the Defendant; that the neighbors are getting more incensed by the day as their children are having to go and the Defendant does not; they admit that the Defendant goes to Church but that he "could be a Chaplain in the service if he won't fight, but that he should be in the service, and that he and his neighbors are good and sore 'about it.'" (Page 85, circled.)

On May 13, 1953, the Department of Justice issued a finding, pursuant to a hearing, that the Registrant was not entitled to a conscientious objector classification. This Finding was, apparently, as indicated by the report, predicated upon the proposition that the Defendant had made the statement that he was not a "pacifist" and since pacifism is opposition to war, or to the use of military force for any person,

it was clear that the Defendant is not opposed to war in any form and he is, therefore, not entitled to exemption as a conscientious objector, within the meaning of the act. (Pages 87 and 88, circled.)

As a result, the Defendant was retained in classification I-A, and was ordered for induction but refused to be inducted. (Page 115, underlined; page also marked 180.) By reason of such refusal, the Defendant was indicted on October 21, 1953 for refusal to submit to induction. He pleaded "not guilty" and his trial was set for December 2, 1953. (Page 104, underlined; also numbered 191.) District Judge O. D. Hamlin found the Defendant "not guilty" on January 13, 1954, and the Defendant was acquitted. (Page 102, underlined; also numbered 193.)

A second Conscientious Objector Form was prepared by Defendant and filed on September 28, 1954, in which the Defendant reiterated his objection to both combatant and non-combatant military training and service. (Page 90, underlined; also numbered 201.) The file contains a photostatic copy of the Honorable Discharge of the Defendant as a Seaman Recruit from the United States Navy on the 6th day of March, 1952. (Page 83, underlined; also numbered 211.)

On October 11, 1954, a certified copy of the Finding of the Bureau of Naval Personnel was filed. This Finding disclosed that the Defendant enlisted in the Naval Reserve on April 3, 1951, to serve for a period of four years. There existed no obligation on the part of the Navy Department to discharge

the Defendant prior to the expiration of his contractual enlistment; however, the facts and circumstances of the Defendant's case had been considered by a Board of Officers appointed for that purpose. The information submitted indicated that Selby is sincere in his religious convictions, objecting to combatant as well as non-combatant duty and the Board recommends that the Defendant be discharged by reason of convenience of the Government and not recommended for reenlistment. It was further requested in the Finding that the Director of Selective Service of the State in which the Defendant resided upon discharge be notified of his discharge from the U. S. Naval Reserve and the reasons therefor; it was further directed that a copy of the Finding be sent to the National Selective Service Headquarters in Washington, D. C. (Page 82, underlined; also page 214.)

On October 11, 1954, the Defendant received a personal appearance before the Local Board. Defendant stated that he was claiming Ministerial and Conscientious Objector Classification. Defendant further stated that he had become a full time Minister on September 1, 1954; that he had not had any secular employment since that date, but that he was, at that date (October 11, 1954, the date of the hearing), looking for a job; that he spent between June 1, 1954 and September 1, 1954, preparing for his appointment as a Pioneer Minister, doing no secular work whatsoever. (Page 78, underlined; also page 218.)

Defendant was retained in Class I-A, and duly appealed therefrom.

On June 7, 1955, the Special Assistant to the Attorney General made a report to the Chairman of the Appeal Board containing a recommendation that the claim of the Defendant to a Conscientious Objector Classification be denied. In this recommendation, a review is made of the hearing and of the resumé of the F.B.I. report. It is recited that the Defendant called the attention of the Hearing Officer to the fact that he had previously purchased a part-ownership in a service station but that his partners in the service station objected to him devoting too much time to his religious activities in Jehovah's Witnesses, and therefore required him to sell out his partnership interest. He testified that during 1954, he "pioneered" in Jehovah's Witnesses' ministry for about two months, but he was unable to serve a longer period of time, as a pioneer because it was necessary for him to make a secular living. He stated that his ambition in life is to become a pioneer minister and earn a livelihood by part-time work. He stated that because of his religious training and belief he could not engage in non-combatant military service and he stated that he has dedicated his life to Jehovah's Witnesses. The Hearing Officer noted that the attitude of certain former employees was that the registrant was insincere in his claim as a Conscientious Objector, and he therefore concluded that the registrant had failed to sustain his claim as a *genuine* Conscientious Objector by offering convincing proof as to his sincerity, and, accordingly, recommended that the claim of the registrant, based upon grounds of conscientious objection, be not sustained.

The Department of Justice adopted the recommendation of the hearing officer and recommended to the appeal board that the registrant's claim be not sustained. (Page 69, underlined; also page 227.)

The resumé of the investigative report made by the F. B. I. is contained in the file, and dated June 13, 1955. The resumé indicated that the Defendant graduated from Watsonville Union High School in 1950; former instructors had no knowledge of the registrant's religious beliefs, or his conscientious objector claim but advised that the registrant was a person of good character and they believed he would be sincere in his statements. The Defendant was employed by the Pringle Tractor Company at Watsonville from April 19, 1950 to April 15, 1952. Several persons, who were associated with the Defendant advised that they "doubt" the sincerity of the registrant's claims as a Conscientious Objector. One fellow employee stated that when he learned that the registrant was claiming to be a conscientious objector, he was very much surprised. He stated that the registrant had never indicated his objections and was a member of the Naval Reserve. This informant noted that the registrant joined the *Jehovah's Witnesses* some time after he had joined the Reserve and prior to the time he was due to be drafted. He stated he did not feel the registrant was sincere in his objections as they seemed to be too new and preceded too closely his imminent induction into the Armed Forces. An informant of the Farmer's Cooperative stated he did not feel that the registrant was sincere because he

appeared to have acquired his objections shortly before he was to be drafted. Another fellow employee stated that he heard the Registrant say, "I'm not worried about the draft, because I am a Conscientious Objector." The interviewee stated that this remark sounded to him like the registrant was using this status as an "out" to escape the draft and he did not feel that the registrant was conscientiously opposed to military service.

Another informant connected with the Townsend Electric Company stated that the defendant was discharged because it was learned that he had bought an interest in a gas station and was leaving his work at the Townsend Electric Company to work at the gas station. He further stated that he did not believe the registrant was sincere in his objections to military service inasmuch as it appeared to him that the registrant was an individual very much concerned with making money. The Defendant became a part owner of the Selby Service Station in June 1954, but ceased being a part owner in or about August 1954. The two partners of the business asked the Defendant to sell his interest to him, as it was their belief that the registrant was not doing his share of the work. The registrant was not able to devote enough time to the service station to satisfy his partners because he was devoting considerable time to the work of Jehovah's Witnesses. According to an interviewee, it was found that the Defendant's family enjoyed an excellent reputation in the vicinity where they lived. The Defendant was considered a fine, upstanding boy.

It was felt that if the Defendant had registered objection to Military Service, that he would be sincere and that his objections would be based upon religious teachings. Another neighbor advised that the Defendant's parents are Jehovah's Witnesses, as are the Defendant and his younger brother. It was the neighbor's opinion that the registrant's mother is very much the dominating member of the family where religion is concerned and that she is counselling the boys. The neighbor stated that it was difficult for him to understand how the registrant can spend as much time as he does making money so that he can obtain material things when it is his claim that he is opposed to military training and service because of his religious convictions. The records of the Watch Tower Bible and Tract Society indicated that the Defendant was ordained into Jehovah's Witnesses as a minister on September 2, 1951, and became a Pioneer on September 1, 1954. However, upon the registrant's request, his Pioneer appointment was terminated on November 1, 1954. Since November 27, 1953, the Defendant has been serving as a stock servant with the Jehovah's Witnesses congregation at Watsonville. References generally advise that the Defendant has been reared in the faith of Jehovah's Witnesses and they believe he is sincere in his religious beliefs and in his opposition to military service. (Page 64, to and including 68; also called page 230, to and including 234.)

On July 10, 1952, the 12th Naval District was asked for verification of prior service of the Defendant and

sent the information to the Local Board that the Defendant was Honorably Discharged as a Conscientious Objector from the Service. (Page 105, circled; also 44, underlined; also 73.) The Defendant was again refused a Conscientious Objector Classification and placed in Classification I-A. Thereafter, he refused to be inducted. (Page 242; also page 24, underlined.)

SUMMARY OF ARGUMENT.

THE APPEAL BOARD HAD NO BASIS IN FACT FOR THE DENIAL OF THE CLAIM MADE BY APPELLANT FOR CLASSIFICATION AS A CONSCIENTIOUS OBJECTOR AND IT ARBITRARILY AND CAPRICIOUSLY CLASSIFIED HIM IN CLASS I-A.

Section 6(j) of the act (50 U.S.C. App. §456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war, both combatant and noncombatant. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God higher than those to the

state. The evidence showed that his beliefs were not the result of political, sociological or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses.

The local board accepted Appellant's testimony. It is undisputed. Notwithstanding the undisputed evidence in his file, the local board and the district appeal board classified Appellant I-A and held that he was not entitled to the conscientious objector status.

The Supreme Court of the United States in *Dickinson v. United States* held that the "dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

Dickinson v. United States, 346 U.S. 389, 74 S. Ct. 152 (Nov. 30, 1953).

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.

Jewell v. United States, 208 F. 2d 770 (6th Cir. Dec. 22, 1953);

Taffs v. United States, 208 F. 2d 329 (8th Cir. Dec. 7, 1953);

Schuman v. United States, 208 F. 2d 801 (9th Cir. Dec. 21, 1953);

United States v. Pekarski, 207 F. 2d 930 (2d Cir. Oct. 23, 1953);

United States v. Alvies, 112 F. Supp. 618 (N. D. Cal. S. D. 1953);

United States v. Graham, 109 F. Supp. 377, 378 (W. D. Ky. 1952);

Annett v. United States, 205 F. 2d 689 (10th Cir. 1953);

United States v. Hartman, 209 F. 2d 366 (2d Cir. Jan. 8, 1954).

ARGUMENT.

THERE WAS NO BASIS IN FACT FOR THE DENIAL OF THE CONSCIENTIOUS OBJECTOR STATUS BY THE APPEAL BOARD TO PETITIONER; CONSEQUENTLY, THE FINAL I-A CLASSIFICATION IS ARBITRARY AND CAPRICIOUS.

(a) Legislative History.

Section 6(j) of the Universal Military Training and Service Act, *supra* (62 Stat. 604, 612, 65 Stat. 75, 86, 50 U.S.C. App. §456(j)) is altogether different from the Selective Service Act of 1917 (40 Stat. 76, 78, 50 U.S.C. App. §201). Section 4 of that act limited the conscientious objector status to members ". . . of any well recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations. . . ." This provision above quoted was similar to that appearing in Section 17 of the Act of February 24, 1864 (13 Stat. 6, 9).

Section 5(g) of the Selective Training and Service Act of 1940 omitted completely the requirement of

pacifism or membership in a "peace church." The 1940 act provided that a conscientious objector, "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," was exempt from participation in combatant training and service.

Pub. L. No. 783, 76th Cong., 2d Sess., 54 Stat. 887, 50 U.S.C. App. §305(g).

For a detailed statement of the legislative hearings and the history of the development of the 1940 law relating to conscientious objection, see Sibley and Jacob, *Conscription of Conscience,* Cornell University Press, Ithaca, New York, 1952, pp. 45-52. There is an interesting discussion of the 1917 and the 1940 conscientious objector provisions appearing in an article written by Marcus entitled "Some Aspects of Military Service," 30 Mich. L. Rev. (1941) 913, 943-946.

The present law is different from the 1917 act, which limited the protection to the pacifist religions. Both the discussions in Congress and the reports on the 1940 act show that Congress changed the law for conscientious objectors. It let the exemption stand on an individual basis, so long as the person based his objections on belief in the Supreme Being.

Under this present law the objections need not be pacifistic. They are sufficient when based on the Bible. Neither the 1948 act nor the 1951 act made reference to pacifism. Neither act fixed the religious standard of any certain religion as the yardstick. The conscientious objection provision extends even to

members of churches whose principles do not oppose war. It is an individual objection.

United States v. Everngam, D.W. Va., 1951, 102 F. Supp. 128, 130-131.

The only change that the 1948 act made was to prevent the nonreligious political, philosophical and sociological objectors from claiming the exemption.

Senate Report 1268, 80th Cong., 2d Sess., May 12, 1948, accompanying Senate Bill 2655, provided as follows:

> "(j) *Conscientious objectors.*—This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman,* 156 F. (2d) 377, certiorari denied, 329 U.S. 795.) Elaborate provision is made for determining claims to exemption on this ground and provision is made for the assignment of persons who object to both combatant and noncombatant military service to work of national importance under the immediate direction of a civilian. The exemption is viewed as a privilege."

Under the law, whether the path of the objector is through the Bible or through the writings of the Shintoists, Moslems or Buddhists, he is entitled to his exemption. The 1948 and 1951 acts protect him. The law does not prescribe any fixed religious path through any of the writings. It did not to avoid

invading religious freedom in violation of the First Amendment. To do so would make the draft boards and the courts a religious hierarchy to determine what is orthodox in conscientious objection. That Congress did not intend.

All the Court can inquire about is confined to what the act says. The act says that one is a conscientious objector entitled to the benefits of the law if he shows that (1) he believes in the Supreme Being, (2) his belief imposes obligations higher than those owed to the state, (3) he opposes both combatant and noncombatant military service, and (4) his beliefs are not political, sociological or philosophical but are based on belief in God.

A strict construction of the act was not intended by Congress. It had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. Congress knew that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his secretary of war thought that conscien-

tious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.' "

As it appears above, the Selective Service System, in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.*, pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolutionary War to the Civil War provision for exemption of conscientious objectors appears in the state constitutions.

The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard v. United States,* 328 U.S. 61, 68-69. In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in view. It intended to preserve the freedom of religion and conscience in regard to conscientious objection and it provided a law whereby such freedom could be preserved.

(b) Review of Evidence.

The documentary evidence submitted by the Appellant establishes that he had a sincere and deep-seated conscientious objection against combatant and

non-combatant military service, which was based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on political, sociological, or philosophical views or a mere personal code, but that it was based on his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to that religion.*

There is not one iota of documentary evidence that in any way disputes the Appellant's proof submitted showing that he is a conscientious objector. The statements of fact made by the Hearing Officer of the Department of Justice and the summary of the F. B. I. investigative report do not contradict, but altogether corroborate the statements made by the Appellant in his conscientious objector form.

The Department of Justice makes an extensive ex parte investigation of the claims for classification as a conscientious objector, when first denied by the Appeal Board pursuant to 50 U.S.C. Appendix, Section 456(j). If there was any adverse evidence, certainly the agents of the F. B. I., in their deep and scrutinous investigation would have turned it up and produced it to the Hearing Officer to be used against the Appellant. There was absolutely no evidence in the draft file that Appellant was willing to do Mili-

*He was raised in a home where his mother, father and nine of his eleven brothers and sisters were members of Jehovah's Witnesses.

tary Service. All of his papers, and every document supplied by him, staunchly presented the contention that he was conscientiously opposed to participation in both combatant and non-combatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the Appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended he was unwilling to go into the Armed Forces and do anything as part of a military machine and that his objection was by reason of his religious training and belief.

The only conclusion that Appellant can reach as to why the Appeal Board denied the conscientious objector status is that it adopted the recommendation of the hearing officer appointed by the Department of Justice which said officer made an erroneous interpretation of the law and which error was continued by the appeal board.

It is well known to the Congress, the Nation, the Government and the Courts of the United States that Jehovah's Witnesses are conscientiously opposed to both combatant and non-combatant military service. They were not unaware that these objections of the Jehovah's Witnesses are based on a belief in the Supremacy of God's Law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subverts the intent of Congress not to discriminate.

In this case, two hearings were had before a Hearing Officer appointed by the Department of Justice. In the first, on May 13, 1953, the Hearing Officer found as to Appellant and as a fact as follows: "He is a member of the Jehovah's Witnesses Sect and claims exemption from both combatant and noncombatant military service." (Plaintiff's Exhibit I, page 161; also 87, circled; also 138, underlined.) As a basis for denial of the conscientious objector classification, the Department of Justice in the first hearing found as follows: "The registrant states that he is not a Pacifist. The Sect has defined Pacifism as 'opposition to war or the use of military force for any purpose.' It is clear that the registrant is not opposed to war in any form and he is therefore not entitled to exemption as a conscientious objector within the meaning of the act." That such a conclusion would not support a basis in fact for a denial of a claim as a conscientious objector has been held by this Court in the recent case of *Affeldt Jr., v. United States of America,* decided December 14, 1954, 218 Federal (2d) 112 (9 Cir.), in which the Court held as follows:

> "The question then arises whether his classification in Class I-A by the Appeal Board was without basis in fact? We are of the opinion that the record here presents the same situation which we have previously dealt with in Hinkle v. United States of America, 216 Fed. (2d) 8 (9 Cir.) and Goetz v. United States of America, 216 Fed. (2d) 270 (9th Cir.), decided October 14, 1954. The above advice and recommendation by

the Department of Justice was in error for the reasons stated in those cases. Since the record wholly fails to disclose any other reason for the Appeal Board's action, in changing its original classification of I-O to the final classification of I-A, we must infer here, as we did in the Hinkle case that the Appeal Board, in substance, adopted the recommendation of the Department of Justice heretofore referred to. That Department indicated there was no reason to doubt the sincerity of Affeldt, in the beliefs which he expressed. Its recommendation was based upon its erroneous advice that since Affeldt would use force in self-defense, and defense of near relatives and brethren, *and because he had stated that he was not a Pacifist, he could not claim to be a conscientious objector within the meaning of the act.* The Appeal Board's obvious adoption of this view resulted in a classification which was without basis in fact, and, accordingly, Affeldt's conviction cannot be sustained. The Judgment is reversed." (Italics ours.)

On June 7, 1955, a second hearing was had before a Hearing Officer appointed by the Department of Justice. (Plaintiff's Exhibit I, page 69, underlined; also page 227.) Here again, the Hearing Officer found as a fact the following: "He is a member of Jehovah's Witnesses and claims exemption from both combatant and non-combatant military service by reason of his religious training and belief. As can be seen, this last report, which is ostensibly that of the Hearing Officer, is only a review of the report made by P. Oscar Smith, Special Assistant to the Attor-

ney General and is not the original report made by the Hearing Officer. (Plaintiff's Exhibit I, page 70, underlined; also page 229.) At the trial of the instant case, however, the trial court made an order directing the United States Attorney to produce the original report made by the Hearing Officer (Reporter's Transcript, page 72), and a copy of this original report was introduced into evidence as Government's Exhibit 2.

A comparison of the report contained in the draft file by the Justice Department and the original report made by the Hearing Officer (Plaintiff's Exhibit II), will indicate that the Justice Department incorporated substantially everything contained in the Hearing Officer's Report *with one glaring exception.* In the conclusion of the original report of the Hearing Officer (Plaintiff's Exhibit II), there is contained a statement as follows: *"It is true that the Registrant has lived a clean and moral life."* This statement is entirely omitted in the resumé made by the Department of Justice recommending against the conscientious objector classification. A finding by the Hearing Officer that the Appellant has lived a clean and moral life is tantamount to a finding that the Appellant is a truthful person. The conclusion of the Hearing Officer was not predicated upon any dispute in the evidence or any finding of untruthfulness or conflict in the evidence. The Hearing Officer merely states as follows: "It is however the opinion of the Hearing Officer that he has failed to sustain his claim as a genuine conscientious objector by offering con-

vincing proof as to his sincerity. In light of the fact that it is felt there is an absence of sincerity to his claim, it is recommended that his claim be not sustained and that he be classified I-A." (Pl. Exh. 2.) These statements are preceded in the conclusion by the following: "Attention is invited to the attitude of certain former employees who expressed the opinion that the Registrant was insincere in his claim as a conscientious objector. It must therefore be concluded that the Hearing Officer denied the I-O classification of the Appellant on two grounds: (1) that the Appellant failed to offer convincing proof as to his sincerity, (2) that certain former employees had expressed opinions that the Registrant was insincere in his claim.

What possible more convincing proof could the Appellant have given than is contained in the file and reviewed in the facts, which show conclusively and without contradiction that the Appellant was baptised a Jehovah's Witness on September 1, 1951, and has ever since that date been actively dedicated to the tenets of his religion as a Jehovah Witness. (Government Exhibit I, page 24, circled; pages 29 through 32, circled.) Thereafter, on March 6, 1952, Appellant was discharged from the Naval Reserve after a full hearing for the reason that he was found to be a conscientious objector. (Government Exhibit I, page 16, circled; page 82, underlined; also page 214.) A larger number of affidavits appear in the file, indicating that the Appellant was a member of the Jehovah's Witnesses and sincere and conscientious

in his beliefs. (Government Exhibit I, page 24, circled; page 22 and page 23, circled; pages 37, 38, 39, 40, 41, 42, 43, 44 and 45, circled). A lengthy affidavit is contained in the file which clearly shows how the Appellant was subjected to the teachings of Jehovah's Witnesses in his own home, where nightly meetings devoted to prayer and to the teachings of the Faith of Jehovah's Witnesses were held by his parents; that he was subjected to these teachings and that he became deeply influenced by them; that as a result of this indoctrination, he became a member of that faith and that thereafter his interest in this work grew and he continued to study and became ordained a minister of the Faith on September 1, 1951. (Plaintiff's Exhibit I, pages 68 to 74, circled.) Even the hysterical statements made by persons who admitted they were incensed over the fact that the Appellant was not in the service, admitted that the Appellant does attend his Church regularly but suggested that he could be a Chaplain in the service if he wouldn't fight. (Government's Exhibit I, page 85.) The F. B. I. report indicates that the records of the Jehovah's Witnesses were checked and were found to indicate that the Appellant was an active member of the religious organization from September 1951, and became a full time pioneer minister on September 1, 1954. However the full time ministerial status was terminated on November 1, 1954, for the reason that it was necessary for him to earn a livelihood, but that since November 27, 1953, to the time of the report the Appellant served as a stock servant in the Jehovah's Witnesses' Congregation at Watsonville.

References generally advise that the Defendant has been reared in the faith of Jehovah's Witnesses and that they believe he is sincere in his religious beliefs, and in his opposition to military service. (Plaintiff's Exhibit I, page 64 to and including 68; also called pages 230, to and including 234.)

None of this documentary proof is controverted or denied by the government and is amply supported by the government's own evidence.

The reference to certain former employees "who expressed the opinion that the Registrant was insincere" can only mean a reference to the F. B. I. report which is contained in the file. (Plaintiff's Exhibit I, page 64, underlined; also page 230.) The following are the only statements appearing in the resumé which could, in any way, reflect upon the Appellant.

> "The Registrant was employed by the Pringle Tractor Company at Watsonville, California, from April 19, 1950 to April 15, 1952. Several persons, who were associated with the Registrant, during this employment, including fellow employees and supervisors advised that they doubt the sincerity of the Registrant's claim as a conscientious objector."

Pure conclusion, without basis in fact.

> "One fellow employee stated that when he learned that the Registrant was claiming to be a conscientious objector, he was very much surprised. He stated that the Registrant had never indicated his objections and was a member of the Naval Reserve. The interviewee also advised that the Registrant's older brother had been in the Armed Forces. He noted that the Registrant

joined the Jehovah's Witnesses some time after he had joined the Reserve and prior to the time he was due to be drafted. He stated he did not feel that the Registrant was sincere in his objections as they seemed to be too new and preceded too closely his imminent induction into the Armed Forces. Several other persons gave much the same information."

Pure suspicion, speculation, opinion and unfounded conclusion.

"An Official of the Cooperative advised that he was somewhat surprised to learn from another employee that the Registrant was a conscientious objector as nothing about him would indicate that such was the case. He stated that he did not feel that the Registrant was sincere because he appeared to have acquired his objections shortly before he would be drafted."

Pure suspicion, speculation, opinion and unfounded conclusion.

"A fellow employee stated that one day he asked the Registrant about his draft status and the Registrant replied, 'I am not worried about the draft, because I am a conscientious objector.' The interviewee stated that this remark sounded to him like the Registrant was using this status as an 'out' to escape the draft and he did not feel that the Registrant was conscientiously opposed to Military Service, but that he just did not want to go into the service and would use this as a means to evade it."

Again pure suspicion, speculation, opinion and unfounded conclusion.

A person connected with the Townsend Electric Company stated as follows:

> "He further stated that he did not believe the Registrant was sincere in his objections to Military Service inasmuch as it appeared to him that the Registrant was an individual very much concerned with making money."

Nothing but opinion and unfounded conclusion.

A neighbor was interviewed and stated as follows:

> "The neighbor stated that he could not feel that the Registrant is sincere in his objections to Military Service but feels that the Registrant is deliberately trying to 'evade service.' It was the neighbor's opinion that the Registrant's mother is very much the dominating member of the family where religion is concerned and that she is counselling the boys. The neighbor stated that it has been his observation that the Registrant drives a 1951 Pontiac and appears to be gainfully employed. He states that it was difficult for him to understand how the Registrant can spend as much time as he does making money so that he can obtain material things when it is his claim that he is opposed to military training and service because of his religious convictions."

More suspicion, speculation, opinion and unfounded conclusion.

Although the record is voluminous as can be seen from the Exhibits, not one other shred of evidence appears in the file which, in any way, could, by any stretch of the imagination, be considered a fact upon which the Appeal Board could justify a rejection of

the Appellant's Claim as a conscientious objector. This being so, it then becomes necessary to analyze the foregoing statements to determine whether they could rise to the dignity of competent evidence or any evidence. A cursory reading of these statements compels the conclusion that they are merely the suspicions, speculations, beliefs and conclusions of these persons without giving a single fact upon which beliefs are predicated, and do not rise to the dignity of evidence.

(c) Discussion of Law Applicable.

The question concerning this type of evidence has been considered in a number of cases involving like questions, one of which was *Annett v. United States of America,* Tenth Circuit, 1953, 205 Fed. 2d 689, in which the Court held:

> "The Government's case, aside from the exhibits of the official actions of the various boards, rests upon the two reports and recommendations of Hearing Officer, Belisle. In his report of December 4, 1950, he set out a number of statements made to him by persons he interviewed. The witnesses adverse to Annett merely stated that they did not believe him to be sincere and did not consider him entitled to a conscientious objector status. They all referred to the fact that in their opinion he had a poor family background. *But all they stated was their opinion or conclusion. They gave no basic facts, no evidence whatever on which such belief was predicated.* Thus the chief of police and long-time former sheriff of Woods County, Oklahoma, stated that Annett came from a poor family back-

ground and he did not consider him entitled to a conscientious objector's rating. Assuming that this appraisal of his background was correct, it is in nowise material or indicative of Annett's status as a conscientious objector. *To merely state that he does not consider him sincere without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence. It states the mere belief and conclusion of the witness.* Whether he is entitled to the status he sought was for the determination of the board to be made from positive evidence adduced before it. All the remaining adverse witnesses set out in Belisle's report merely stated that they did not believe he was entitled to what he sought without the statement of a single fact on which they based their belief. To illustrate: an undersheriff stated that he was not sufficiently acquainted with Annett to comment on his sincerity of this conscientious objector claim; yet, he stated that he did not believe that he was entitled to it."

"Your hearing officer was not impressed with the manner in which the registrant answered questions propounded to him. There is an abundant amount of evidence furnished in his behalf, principally by members of his own faith. However, a large portion of it is devoted to his ministerial activities, which your hearing officer is not endeavoring to pass upon other than in connection with the claim of registrant as a conscientious objector. Your hearing officer is unable to reconcile the belief of the registrant that he may, under the Scriptures, defend himself even to the extent of killing, but not able, under his faith, to serve his country in military service; especial-

ly, where he was unable to state his authority for the defense of himself in the same Bible which he used to sustain his objections. Your hearing officer is not satisfied with the sincerity of the registrant for the further reason that the evidence furnished by the registrant was inadequate and did not have that quality necessary to sustain his position."

"It is thus clear that Belisle applied an erroneous standard in determining that Annett was not entitled to a conscientious objector status. The standard laid down in the statute is religious training and belief opposed to participation in war in any form and as stated in the statute, ' "Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relations * * * "' Annett's positive uncontradicted testimony established that his religious beliefs met this test. The mere fact that he was willing to fight in defense of his own life does not mean that he did not have good-faith religious scruples based upon the teachings of his church against the command of his country to go to war and to kill therein."

"In his second report filed February 14, 1952, Belisle likewise concluded that Annett was not entitled to the status claimed by him. These conclusions were based in general on the same line of information reported in his first report. In fact, it was based in large part upon the same statements of the same witnesses as in the first report. Illustrative of the character of the evidence are the following excerpts:

"In his second report recommending a rejection of the claimed status, Belisle stated that the

background of Annett was not good in that his parents were of questionable character and reputation and had formerly belonged to the Catholic Church but joined Jehovah's Witnesses in the latter part of the 1930's; that this was quite a departure and that the two religions could in no way be reconciled. What materiality this had upon whether Annett became a member in good faith of the Jehovah Witness Church and had a religious conscientious objection to going to war is difficult of comprehension. Belisle did report that Annett was raised almost wholly in the faith of Jehovah's Witnesses and was endeavoring to rise above the reputation of his family and in some respects had some fine qualities. He also reported that Annett furnished abundant testimony and evidence of his sincerity. Belisle was impressed by the fact, and no doubt influenced in his conclusions, by his impression that Annett did not have ' "that humility ordinarily incident to one having the deep, sincere, religious objection to service in our military forces." ' Based upon this he stated, ' "It is, therefore, the considered opinion of your hearing officer that the evidence is insufficient to sustain the position taken by the registrant." '

"The record is devoid of a single act, word or any conduct by Annett or of the testimony of any witness to a single fact which would tend to show that Annett was not a member in good faith of the Jehovah Witness religious organization with religious convictions against participation in war. A careful analysis of the record compels the majority to conclude that there is a complete lack of any substantial evidence to support the conclusions of the board and its order was there-

fore void. The order of the board being void, Annett was guilty of no offense in refusing to submit to induction."

"Since the record is devoid of any evidence sustaining the finding of the board that Annett was not a member in good faith of Jehovah's Witnesses, possessed of an honest religious conviction against participation in war, the judgment cannot stand and it is, therefore, not necessary to separately inquire whether there is evidence sufficient to support the finding that he was not a minister of the Jehovah Witness faith." (Italics ours.)

There have been a great many decisions by many courts of appeal including the Ninth Circuit that the rule laid down in *Dickinson v. United States,* 346 U.S. 389, is applicable in the consideration of a classification as conscientious objector. The Supreme Court in that case held as follows:

"The Court below in affirming the conviction apparently thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence . . . However, Dickinson's claims were not disputed by any evidence presented to the Selective Service Authority, nor was any cited by the Court of Appeals. The task of the Courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed, the board bears the ultimate responsibility for resolving the conflict

—the Courts will not interfere. Nor will the Courts apply the test of 'substantial evidence.' However, the Courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption. . . . But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the act and foreign to our concepts of justice."

Other cases applying this "basis in fact" test, are:

Weaver v. U. S., 8th Cir., 1954, 210 F. 2d 815, 822, 823;

Taffs v. U. S., 8th Cir., 1953, 208 F. 2d 329, 331, 332;

U. S. v. Hartman, 2nd Cir., 1954, 209 F. 2d 366, 368, 369, 371;

U. S. v. Sicurella, 348 U. S. 385;

Olvera v. U. S., 223 F. 2d 880, 5th Cir;

Pine v. U. S., 4th Cir., 1954, 212 F. 2d 93, 96, 97;

Arndt v. U. S., 222 F. 2d 485, 5th Cir.;

Jewell v. U. S., 6th Cir., 1953, 208 F. 2d 770, 771-772;

U. S. v. Ransom, 223 F. 2d 15;

Jessen v. U. S., 10th Cir., 1954, 212 F. 2d 897, 899-900;

U. S. v. Close, 7th Cir., 1954, 215 F. 2d 439, 441;

U. S. v. Wilson, 7th Cir., 1954, 215 F. 2d 443, 445, 446.

In *Jessen v. U. S.,* 10th Cir., 1954, 212 F. 2d 897, 900, after quoting from *Dickinson v. U. S.,* 346 U. S. 389, 1953, the Court said:

> "Here the uncontroverted evidence supported the Registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the trial court in this action is in direct conflict with the holdings in other cases decided by other Courts of Appeals. In those cases, the Appellant, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objections to service, and the same religious training. While different speculations were relied upon by the government which were discussed and rejected by the Courts in those cases, the Courts were also called upon to say on identical facts whether there was basis in fact. For instance, in the *Jessen* case (supra) where the 10th Circuit (after following *Taffs v. U. S.*, 8th Circuit, 1953, 208 F. 2d 329) said:

> "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board. All of the witnesses interviewed by the Federal Bureau of Investigation, who doubted the sincerity of Appellant, placed their doubt upon the pure speculation that because he became a conscientious objector and a member of the Jehovah's Witnesses at or about the time he was to be drafted that he was, therefore, insincere. This question has been considered and rejected by the 9th Circuit, in a case directly in point—*Schuman v. U. S.*, 9th Circuit, 1953, 208

> Fed. 2nd, 801, where the court held: 'The length of time one has been connected with a faith has no bearing on whether one is entitled to exemption as a conscientious objector.' The only question to be considered is whether the Registrant has a sincere ('i.e. conscientious') religious opposition to participation in war in any form."

The hearing officer's reports and the Department of Justice reports should be scrutinized for facts, not speculations. If it appears that there is nothing affirmatively denying the statements of the registrant and the recommendation is based on unsupported opinions, suspicions and conclusions of others that appellant's beliefs were not deep-seated, this standing alone is not a contradiction of the proof of sincerity. These suspicions are based largely, if not exclusively, on the proposition that Appellant has not been long and deeply trained in religion.

One fallacious defense of the report of the hearing officer was made by the Government in the court below. It was that he exercised his right of judging the credibility of the petitioner. The hearing officer did not undertake to say that he disbelieved what Appellant said. At the hearing he made no challenge of the credibility of the petitioner. It cannot be speculated that he disbelieved Selby. *(Annett v. United States,* 10th Cir., 1953, 205 F. 2d 689, 691.) A draft board or a hearing officer has the right to challenge the believability of a registrant but if he does so he must make a record of the exercise of the right and state expressly that he does not believe the claimant. Fail-

ure thus to make an entry that he disbelieved the registrant precludes the Government from arguing it here. *National Labor Relations Board v. Dinon Coil Co.,* 201 F. 2d 484, is therefore not in point.—See also *Weaver v. United States,* 8th Cir., 1954, 210 F. 2d 815.

In the instant action, however, we have a direct statement made by the Hearing Officer that he did believe the Defendant by finding as follows: "It is true that the registrant has lived a clean and moral life". (Pl. Exh. 2, also Reporter's Transcript, page 78.)

A case directly in point is *Schuman v. United States,* 9th Cir., 1953, 208 F. 2d 801. (Compare *White v. United States,* 9th Cir., Sept. 14, 1954, 215 F. 2d 782.) Schuman filed the conscientious objector form late. He became one of Jehovah's Witnesses after he filed his classification questionnaire. The facts are stated in the opinion in that case.—See 208 F. 2d, pp. 805-806.

The report and recommendation of the hearing officer and the final recommendation by the Assistant Attorney General were not findings of fact. They refer to no facts or evidence that disputed the testimony given by Defendant. The conclusions of fact and law made by the hearing officer and the Assistant Attorney General were erroneous and contrary to fact and law. They do not constitute any facts. They may not be relied upon as basis in fact. This is especially true since no facts were referred to by the hearing officer or the Assistant Attorney General that in any way contradicted the testimony of Defendant.

The rule of *Dickinson v. United States,* 346 U.S. 389, 396-397 (1953), applies here. This rule also rejects the conclusion of the hearing officer of the Department of Justice and the report of the Assistant Attorney General in the same way that it also rejects the final I-A classification by the appeal board. Neither of these officers is authorized to speculate and guess or draw inferences contrary to the undisputed evidence.—*Dickinson v. United States,* 346 U. S. 389 (1953); see also *Schuman v. United States,* 9th Cir., 1953, 208 F. 2d 801, 802, 805-806.

Since the hearing officer and the Assistant Attorney General cannot speculate, then their speculations are unauthorized and cannot be relied upon by this Court as basis in fact for the denial of the conscientious objector status. It should be remembered that registrants are authorized to change their status after the filing of their classification questionnaires. There was a change of the status of the registrant in *Dickinson v. United States,* 346 U. S. 389, 392-393, 395 (1953.) This was held not to be any basis in fact for the denial of the classification. Section 1625.1(a) of the Selective Service Regulations provides that "no classification is permanent." Section 1625.2 provides for the reopening of the classification when there has been a change in the status of the registrant, following his classification. These regulations were interpreted by the court in *Hull v. Stalter,* 7th Cir., 1945, 151 F. 2d 633, 635, to mean that a registrant must have his status determined according to the time of the final classification rather than his status at the time of his regis-

tration or at the time of his first classification.—See also *Brown v. United States,* 9th Cir., Oct. 4, 1954, 216 F. 2d 258.

The scope of review in Selective Service cases as far as the classification is concerned is limited and restricted. *(Estep v. United States,* 327 U. S. 114, 121-122 (1946).) In cases where the review is restricted there must be a strict compliance with the requirements of procedural due process by the administrative agency. *(N. L. R. B. v. Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446.) For the final order to be valid the local board must strictly comply with the procedural requirements.—*Ver Mehren v. Sirmyer,* 8th Cir., 1929, 36 F. 2d 876, 881; *United States v. Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 92; *Ex parte Fabiani,* E. D. Pa., 1952, 105 F. Supp. 139, 147-148; *United States v. Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 797; *Bejelis v. United States,* 6th Cir., 1953, 206 F. 2d 354, 358.

The report of the hearing officer was adopted by the Department of Justice and forwarded to the appeal board with a recommendation that it be followed. The appeal board followed the recommendation. While the recommendation was only advisory, the fact is that it was accepted and acted upon then by the appeal board. The appeal board concurred in the conclusions reached by the hearing officer. It gave petitioner a I-A classification and denied his conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error.—*United*

States v. Everngam, D. W. Va., 1951, 102 F. Supp. 128, 131; *Goetz v. United States,* 9th Cir., Oct. 14, 1954, 216 F. 2d 270; *Hinkle v. United States,* 9th Cir., Sept. 24, 1954, 216 F. 2d 8; *Clementino v. United States,* 9th Cir., Sept. 27, 1954, 216 F. 2d 10.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board become a link in the chain. Since it is one of the links of the chain, its strength must be tested. *(United States v. Romano,* S. D. N. Y., 1952, 103 F. Supp. 597, 600-601.) The illegal recommendation by the hearing officer and the Department of Justice to the appeal board produces a break in the link and makes the entire Selective Service chain useless, void and of no force and effect. In *Kessler v. Strecker,* 307 U. S. 22, 34 (1939), the Court held that if one of the elements is lacking the "proceeding is void and must be set aside." Acceptance of the recommendation of the Department of Justice that has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.—*Hinkle v. United States,* supra; *Clementino v. United States,* supra.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *Hinkle v.*

United States, supra; *United States v. Everngam,* D. W. Va., 1951, 102 F. Supp. 128, 130, 131; see also *Goetz v. United States,* 9th Cir., supra; *United States v. Bouziden,* W. D. Okla., 1952, 108 F. Supp. 395, 397-398; compare *Taffs v. United States,* 8th Cir., 1953, 208 F. 2d 329, 330-331.

The report of the hearing officer and the recommendation of the hearing officer to find against petitioner on grounds outside the law are condemned by *Reel v. Badt,* 2 Cir., 1944, 141 F. 2d 845, 847. In that case the court said: "In other words he reached a conclusion as a matter of law which was directly opposed to our decision in *U. S. v. Kauten,* 2 Cir., 133 F. 2d 703."—See also *Phillips v. Downer,* 2d Cir., 1943, 135 F. 2d 521, 525-526.

It is respectfully submitted, therefore, that the recommendation by the hearing officer and the Department of Justice to the appeal board is illegal, arbitrary and capricious, and jaundiced and destroyed the appeal board classification upon which the order to report was based.

It may be argued that the classification by the draft boards is final even though erroneous. This is not a true statement of the law. It is true so long as the Government can show some contradiction or dispute in the administrative record. In the absence of such dispute of fact, it cannot be said that there is a question of fact involved. Since there is no question of fact involved, and the classification is contrary to the facts establishing eligiblity for the classification claimed, there is no basis in fact and the draft boards are without jurisdiction, as a matter of law.—*Estep*

v. United States, 327 U. S. 114, 122-123 (1946); *Dickinson v. United States,* 346 U. S. 389, 394, 396-397; *Schuman v. United States,* 9th Cir., 1953, 208 F. 2d 801, 802, 804-805; *Jewell v. United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *United States v. Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369-370.

An attempted distinction of the "no basis in fact" rule is made between the case of a conscientious objector and a minister. *(United States v. Simmons,* 7th Cir., 1954, 213 F. 2d 901, 904-905; *White v. United States,* 9th Cir., 1954, 215 F. 2d 782.) It is said that determination of the conscientious objector status involves inquiring into mental processes of a registrant. Those courts say that when the local board has said what is going on in the registrant's mind, such conclusion is final and settles the matter. It cannot be reviewed in court, declare such courts.

There is not one word in the act or the regulations that gives the board or the courts the right so to speculate. They cannot say what goes on in the mind of a conscientious objector claiming such classification, as they cannot in the case of a minister claiming his exemption.

The act deals only with the objective statements and declarations of the registrants. It does not mention or go into the subjective. Congress conferred no right to roam into the field of mind reading, as suggested by the Government. Congress confined the courts and the boards to determination of the conscientious objector status based only on the concrete and outward manifestations of the registrant.

The act deals with objection or opposition to service in the armed forces. Objection is something objective. It is manifested by speech. It is something that can be determined as easily as any other fact. Does the registrant object to the point of refusing to do military service? If he does he is an objector. The inquiry is then specified by the act, dealing again with the concrete not mind reading. The act says: Is his objection based upon religious training and belief? This is an element that does not involve the subjective. It deals with that which is manifest. It can be established the same as can the ministry claim. There is no broader room for speculation permitted by the act here because it deals with religious training and belief. The two concrete facts of opposition to service and religious training and belief make a *prima facie* case for classification as a conscientious objector under the statute.

By using the word "conscientiously" from the statute, the Government argues that it can apply its own arbitrary ideas as to what constitutes a conscientious objector. Use of the word does not allow the Government to write its own definition of what a conscientious objector is. The definition appears in the statute.

The use of the word "conscientiously" in the act that qualifies objection to training and service does not give the Government an illegal, vague and indefinite dragnet. The word is not a license to indulge in speculation. The word has no magic to it. It has an ordinary definition known to man. It is not a word that is confined to the esoteric or to clairvoyants. It cannot be used to take the board and the courts out of this

world into the stratosphere of speculation. But the Government would have the Court soar up into it, contrary to law.

By the use of the word "conscientiously" Congress merely intended that if a man was a faker, feigning or falsely impersonating a conscientious objector the board could conclude that he was not "conscientiously" opposed. But surely by the use of the word "conscientiously" Congress did not intend to allow a board to speculate and defy the undisputed evidence showing that a person is an objector to training and service, based on religious training and belief. The use of the word "conscientiously" merely permits the draft board to do what the Supreme Court said in *Dickinson v. United States:*

> "The board must find and record affirmative evidence that he has misrepresented his case."—346 U.S. 389, 399.

Had Congress intended to give such claimed unlimited power to the boards in cases of conscientious objectors it would have said so. Surely it did not intend to allow the courts to interpret the word "conscientiously," used in the statute, to give a power to the boards over conscientious objectors that was not given to the boards in the case of other registrants.

If the Government is right on the interpretation it puts on the act then it will be impossible for a court ever to say that there is "no basis in fact" for the denial of the conscientious objector status. If the boards can, under a vague interpretation of "conscientiously," reject the evidence of one conscientious objec-

tor without any concrete, definite, disputing evidence in one case, then they can do it in all cases of conscientious objectors, regardless of the facts. Then all is ended. No longer will the "no basis in fact" rule mean anything to the conscientious objector. Through this sleight-of-hand process of argument the Government is attempting to amend the act. The Court should continue to stand by the proposition that conscientious objectors are to be given the same fair treatment under the act as all other classes of registrants are entitled to receive.

Respondent subjugates the power of this Court to that of the appeal board. It may be said that the Court is with nothing but the cold record before it. Add the contention that the Court is not in a good position to rule on a question that involves the examination of the state of mind of a defendant. However, the appeal board that made the final classification in this case, petitioner submits, is in no better position than this Court. All that the appeal board had was the cold record before it. That is no more than this Court has. What superior powers do the men on the appeal board have over the judges on this Court in interpreting the law and applying it to the cold record? None. The power is with this Court to correct the gentlemen on the appeal board.

The suggestion was made in the court below that an inference can be drawn, particularly after looking at the registrant himself, that this registrant is not sincere and religious. This should be rejected. (*White v. United States,* 9th Cir., Sept. 14, 1954, 215 F. 2d 782.)

The appeal board here did not see the registrant. It had no chance to exercise the right claimed by the Government. It did not give any reasons why it rejected the claim. It is pure speculation for the respondent to suggest that this was the reason for the denial of the conscientious objector status. (*Dickinson v. United States,* supra; *Schuman v. U. S.,* supra.) It must affirmatively appear from proof in the file. The respondent shows that it is relying entirely on speculation. This is not permitted in cases of this kind.

There is no basis in fact for the classification in this case, because there are no facts that contradict the documentary proof submitted by petitioner. The facts established in his case show that he is a conscientious objector to combatant and noncombatant military service by reason of religious training and belief. The classification given is beyond the jurisdiction of the boards.

It is respectfully submitted that the denial of the conscientious objector claim by the appeal board is without basis in fact, arbitrary and capricious, and therefore a nullity.

It follows therefore that Selby violated no law by refusing to be inducted and the judgment of the trial court should be reversed.

Dated, San Francisco, California,
May 10, 1957.

JOHN H. BRILL,
Attorney for Appellant.

No. 15,376

IN THE

United States Court of Appeals

For the Ninth Circuit

JAY W. SELBY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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No. 15,376

IN THE

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JAY W. SELBY,

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Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 3231 and Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on June 6, 1956 for violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a) in that he knowingly refused to submit himself to induction (Tr. 3-4). He pleaded not guilty, waived jury trial (Tr. 6), and was tried by the Honorable Michael J.

Roche on August 27, 1956 (Tr. 5). Appellant thereafter was adjudged guilty (Tr. 6) and on September 4, 1956 was sentenced to a term of two years (Tr. 7-8). Appeal was timely made to this court from the judgment of conviction (Tr. 8-9).

STATEMENT OF FACTS.

Appellant first registered with Selective Service on July 18, 1950, and gave his date of birth as February 15, 1932 (File 1 and 2).[1]

Appellant's Classification Questionnaire was filed with his Local Board on April 17, 1951 (File 5). On page 2 of the Questionnaire, appellant stated that he was a member of a reserve component of the Armed Forces, to-wit, a seaman recruit in the Naval Reserve, having entered such component on April 3, 1951, and was at the time performing service by satisfactorily participating in scheduled drills and training periods (File 6). He made no claim that he was a minister or student preparing for the ministry (File 7), nor did he claim that he was conscientiously opposed to participation in war in any form (File 11).

On April 30, 1951, appellant was classified 1-A by the Local Board (File 12). In the Special Form for Conscientious Objector, filed with the Local Board

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[1]"File" refers to appellant's Selective Service file which was appellee's exhibit No. 1 in evidence in the court below. The file numbers referred to are the handwritten uncircled numerals on the bottom of the various pages of the file. Where possible, the description and date of the particular documents mentioned will be set forth for the purpose of identification.

and dated July 14, 1952, appellant claimed (apparently for the first time) that because of religious training and belief he was conscientiously opposed to participation in both combatant and non-combatant training or service (File 26). He alleged further that he acquired the belief, which was the basis for his conscientious objection claim, early in 1951 (File 27). Appellant stated he relied on the Watch Tower Bible and Tract Society for religious guidance (File 27).

However, at a personal appearance before the Local Board on August 11, 1952, appellant stated he would only accept a ministerial classification, and would not be satisfied with a classification of 1-O as a conscientious objector (File 118). On the same date, the Local Board continued appellant's classification of 1-A (File 12).

On September 30, 1952, appellant wrote the Local Board stating he desired another personal appearance before the Board so that he might be reclassified 1-AO, a conscientious objector opposed to combatant service only (File 128). On November 3, 1952, at the personal hearing before the Local Board, appellant nevertheless requested a classification of 1-O and indicated he was again opposed to both combatant and non-combatant service (File 133). The Local Board, on the same day, continued the appellant in class 1-A, and refused to reopen the case (File 12 and 133).

The classification of 1-A was appealed and appellant's case referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objection claim.

On May 13, 1953, T. Oscar Smith, Special Assistant to the Attorney General, recommended in a letter addressed to the Appeal Board, that after consideration of the entire file and record, the claim of conscientious objection from both combatant and non-combatant training and service should not be sustained (File 161 and 162). The letter states that the Honorable Ernest E. Williams, Hearing Officer for the Northern District of California, was of the opinion that appellant had failed to sustain his conscientious objector claim (File 162). The Appeal Board classified appellant 1-A on June 18, 1953 (File 174).

On June 30, 1953, appellant was ordered to report for induction (File 168). Appellant refused to submit for induction on August 20, 1953 (File 178), and thereafter was indicted by the Grand Jury on October 21, 1953 (File 191). Appellant was found not guilty by United States District Judge O. D. Hamlin on January 13, 1954 (File 193).

On January 28, 1954, the Coordinator of District No. 3, Selective Service System, San Francisco, wrote appellant's Local Board indicating that the acquittal was based upon the Local Board's procedural failure to consider certain memoranda (File 160) furnished by neighbors of appellant to the Local Board, which memoranda had been considered by the Appeal Board (File 196).

On September 13, 1954, the Local Board classified the appellant 1-A (File 14).

At a personal appearance before the Local Board on October 11, 1954, appellant reported that he had

been a full time minister since September 1, 1954, and since that date had not worked at secular employment (File 215). Appellant claimed both a ministerial and conscientious objection classification (File 215). On the same date, the Local Board continued appellant in class 1-A (File 14).

Appellant appealed the classification of 1-A, and his case was again referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objection claim.

In a letter dated June 7, 1955, addressed to the Appeal Board, T. Oscar Smith, Special Assistant to the Attorney General, recommended that appellant's claim to conscientious objection be not sustained (File 229). The letter stated that Hearing Officer Ernest E. Williams, before whom the appellant appeared personally, accompanied by his father, concluded that "the registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity" (File 229). The letter further stated that the Hearing Officer concluded that "there is an absence of sincerity in the registrant's claim" (File 229).

According to this letter of June 7, 1955, appellant advised the Hearing Officer that if he were classified 1-O, he would be unwilling to engage in civilian work in lieu of induction (File 228). Appellant testified before Mr. Williams that at that time he devoted but 12 hours a month to preaching, and about 8 additional hours to study and preparation of religious talks (File 229). Appellant advised the Hearing Officer

that during 1954, he "pioneered" in Jehovah Witnesses ministry for about two months (File 228). Appellant conceded that he was unable to serve a longer period of time as a "pioneer" because it was necessary for him to make a secular living (File 228).

On August 18, 1955, appellant was classified 1-A by the Appeal Board (File 224), and on October 21, 1955, he was ordered by his Local Board to report for induction (File 241). Appellant again refused induction on November 1, 1955 (File 242) and was indicted for such failure on June 6, 1956 (Tr. 3-4).

It was stipulated at the trial that although ordered to report for induction, appellant refused (Tr. 13). It was further stipulated that a certified photostatic copy of the Selective Service file of appellant be marked, and introduced as government's exhibit 1 in evidence in place of the original file (Tr. 13). Appellant offered no evidence nor did he testify in his own defense (Tr. 26).

QUESTION INVOLVED.

Was there a basis in fact for appellant's classification of 1-A by the Appeal Board?

STATUTE INVOLVED.

The statute involved is set forth in the Appendix.

ARGUMENT.

THE APPEAL BOARD HAD BASIS IN FACT FOR DENYING APPELLANT EXEMPTION AS A CONSCIENTIOUS OBJECTOR, A CLASSIFICATION OF 1-O.

Appellant complains that the denial of a conscientious objector status, a classification of 1-O, by the Appeal Board and by the Department of Justice, in its recommendation to the Appeal Board, were without basis in fact and were arbitrary, capricious and contrary to law. Appellant apparently concedes that there was a basis in fact for denying the classification of 4-D, that of a minister or student preparing for the ministry.

(1) Lack of Sincerity is a Basis in Fact for Denying a Claim for Conscientious objection.

There has been in the past much litigation as to what constitutes a claim for classification as a conscientious objector, and what circumstances reflected in a registrant's file justifies a Selective Service board in denying such a claim. In other words, what evidence or basis in fact would permit a board to deny a claim of conscientious objection?

The courts have drawn a distinction, since the case of *Dickinson v. United States,* 346 U.S. 389 was decided, as to the susceptibility of proof between a claim for ministerial status and a claim of conscientious objection. While the question of whether a registrant is a minister may be a factual one susceptible of exact proof by evidence, the best evidence of conscientious objection is not the registrant's assertions or those of

his associates, but his sincerity, good faith, credibility and demeanor.

Witmer v. United States, 348 U.S. 375;
White v. United States, (9th Cir.) 215 F. 2d 782, Cert. den., 348 U.S. 970;
Tomlinson v. United States, (9th Cir.) 216 F. 2d 12, Cert. den., 348 U.S. 970;
Shepherd v. United States, (9th Cir.) 217 F. 2d 942, 220 F. 2d 885;
Campbell v. United States, (4th Cir.) 221 F. 2d 454.

The Supreme Court in *Witmer v. United States,* supra, confronted with the issue of what constituted a basis in fact for denial of a conscientious objector claim, held that any fact which casts doubt on the sincerity of the registrant is relevant in such cases, and is "affirmative evidence" that the registrant has not painted a complete and accurate picture. The court therefore held that the ultimate question is the sincerity of the registrant.

The court stated at pages 381 and 382 the following:

> "Here the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which casts doubt on the veracity of the registrant is relevant.

> It is 'affirmative evidence . . . that a registrant has not painted a complete or accurate picture . . .' *Dickinson v. United States,* supra, p. 396."

The court further decided that a registrant claiming successive deferments on different grounds and making inconsistent statements concerning his claim of conscientious objection creates considerable doubt as to the sincerity of his claim and provides a basis in fact for the denial thereof.

This court, in September 1954, prior to the Supreme Court decision of *Witmer v. United States,* supra, had occasion to decide the two cases of *White v. United States,* (9th Cir.) 215 F. 2d 782, cert. den., 348 U.S. 970, and *Tomlinson v. United States,* (9th Cir.) 216 F.2d 12, cert. den., 348 U.S. 970, which clarified and set forth what standards may be considered in denying a claim of conscientious objection. In *White v. United States,* supra, this court pointed out that, in the determination of a registrant's belief and his sincerity therein, the best evidence on the question may well be his credibility and demeanor in a personal appearance before the local boards of the Selective Service System. In holding that the appeal board may take into consideration the fact that the local board had made a classification following its opportunity to observe the registrant's demeanor during his personal appearance, this court stated at pages 784 and 785:

> "The question before the local board had to do not with what religious organization or sect the

> appellant adhered to, nor what the teachings of that sect or organization was, but what was the sincere belief of this particular registrant and what was the extent of his conscientious opposition to military service. In other words, the local board initially, and the appeal board subsequently, were called upon to evaluate a mental attitude and belief. It is plain that when such matters are to be determined and passed upon, the attitude and demeanor of the person in question is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant, and as to the extent and quality of his beliefs. The local board, before whom the registrant appeared, had an opportunity surpassing that available to us or to the appeal board itself to determine and judge as to these matters."

Tomlinson v. United States, supra, holds that an appeal board may rely on the recommendation of the Department of Justice concerning a registrant's sincerity as a primary basis in fact for denying the claim of conscientious objection. This court stated at page 17:

> "In this instance it is plain that the appeal board's conclusion was based primarily upon the report of the hearing officer. Such a report may furnish the basis in fact which supports the board's action. *Kent v. United States,* 9 Cir. 207 F.2d 234, 237; *Roberson v. United States,* 10 Cir. 208 F.2d 166, 169. Its conclusions may also have been based in part upon that portion of the registrant's file which was transmitted with the appeal."

In addition, the court pointed out that objection to any governmental service is not an objection which the act recognizes and reflects directly upon the registrant's sincerity. The court stated at page 18:

> "The appeal board may well have been of the view that this registrant is primarily an objector who will have nothing to do with the affairs 'of this world.' True he is conscientiously opposed to killing; but his real objection to noncombatant service would appear to be its interfering with his carrying 'the message' and doing what he chose to call 'ministerial work.' We think that in drawing the line where it did, it cannot be said that the appeal board acted without basis in fact."

Thus, the Supreme Court, as well as this court, has held that the best evidence upon the question as to what a registrant claiming conscientious objection may believe or feel, is not his assertion or those of his associates, but his credibility and demeanor in personal appearances before the fact finders, the local board, and the Department of Justice Hearing Officer. Furthermore, an appeal board may rely for a basis in fact in denying a conscientious objector claim upon the report of the Hearing Officer forwarded through the recommendation of the Department of Justice, as well as the entire file of the registrant transmitted on appeal.

Appellant concedes that this court, in *White v. United States,* supra, (Appellant's brief 47) has declared the Selective Service boards may employ the subjective test in determining conscientious objection. *Appellant complains, however, that the statute and*

regulations give no such right to this court "so to speculate" (Italics added). Despite the volume of cases cited by appellant, it appears that he has completely disregarded the decision of the Supreme Court in *Witmer v. United States,* supra, and of this court in *Tomlinson v. United States,* supra.

What appellant therefore, seeks is a reversal by this court of the *Witmer, White* and *Tomlinson* cases, supra.

Nevertheless, an examination of appellant's Selective Service file, more fully discussed infra, reveals inconsistent statements, reversals of position, vague and uncertain assertions, membership in a military organization, objection to any governmental service whatsoever and claims of successive deferments and exemptions on different grounds.

Each of these factors has been considered in determining whether a registrant is sincere in his claim, and has been held in previous cases to form a basis in fact for questioning sincerity and denying a claim of conscientious objection.

Witmer v. United States, supra;
White v. United States, supra;
Tomlinson v. United States, supra;
Campbell v. United States, supra;
Borisuk v. United States, (3rd Cir.) 206 F.2d 338.

(2) The Evidence of Insincerity was Sufficient to Provide a Basis in Fact for Denying Claim of Conscientious Objection.

The burden is upon the registrant to establish his eligibility for deferment or exemption from military service to the satisfaction of the boards of the Selective Service System. The registrant has the burden to show clearly that he is entitled to classification as a conscientious objector. He cannot shift this burden of proof by his statement as to his belief.

Campbell v. United States, supra;

Gaston v. United States (4th Cir), 222 F. 2d 818;

Swaczk v. United States (1st Cir.), 156 F. 2d 17, Cert. den. 329 U.S. 726.

See also

Palmer v. United States (3rd Cir.), 223 F.2d 893, Cert. den. 350 U.S. 873.

The Department of Justice and the Local and Appeal Board found that the appellant had failed to establish his conscientious objection to combatant and noncombatant service arising out of religious training and belief. The government has set forth what it considers an objective Statement of Facts (supra) based on the Selective Service file itself and not colored with inference and argument. The facts contained in the file speak for themselves and establish a clear, substantial and reasonable basis for the denial in the last instance by the Appeal Board of the conscientious objection claim.

Appellant has placed considerable emphasis upon the numerous affidavits and statements of associates of

appellant filed with the Local Board. These statements were introduced obviously for the purpose of supporting a claim for ministerial deferment. Such claim was apparently abandoned prior to trial, and was not seriously urged in the court below.

The sole occasion appellant claimed full time activity as a minister was during a two month period in which a personal hearing was held before the Local Board on October 11, 1954, shortly before his second appeal (File 215). On that occasion appellant claimed both a ministerial and conscientious objector classification, but emphasized that he desired to be classified a minister. It is significant that in the hearing before the Department of Justice following his second appeal, as reported in the letter dated June 7, 1955, appellant conceded he had returned to secular employment and had "pioneered" for only two months in 1954 (File 228).

The Federal Bureau of Investigation resumé attached to the letter of June 7, 1955 (File 232 and 233) reveals appellant devoted in 1949 only seven hours of activity in the Jehovah Witnesses sect. His record reflected no activity during 1950, nor the first six months of 1951. He gave but a total of 27 hours through the remainder of 1951 and spent a total of 75 hours each in the years 1952 and 1953 in Jehovah Witness activity. Appellant in September 1954 spent 106 hours in Jehovah Witness work, and in October of that year a total of 88 hours. The resumé disclosed that appellant ceased his "pioneer" activities on November 1, 1954, upon his own request.

Therefore, the only real issue is whether there is a basis in fact for the denial of the conscientious objection claim since there is certainly no dispute that there was a substantial basis for denial of ministerial status.[2]

a. Inconsistent Acts and Claims.

Appellant's primary contact with his Local Board was the filing of his Classification Questionnaire on April 17, 1951 (File 5). He made no claim whatsoever that he was conscientiously opposed to war in any form (File 11) or that he was a minister or student preparing for the ministry (File 7). However, he stated he was a member of the Naval Reserve, having entered the component a few days previously on April 3, 1951 (File 6). It may reasonably be inferred that appellant at that point hoped for deferment upon the basis of this military service.

Appellant was classified 1-A by the Local Board on April 30, 1951 (File 12). The Local Board was thereafter advised that some question of conscientious objection was being urged by appellant. The board was notified on March 13, 1952, not by appellant but by the Government itself, that appellant had been dis-

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[2]In *Reese v. United States* (9th Cir.) 225 F.2d 776, this court held that a person who irregularly or incidentally preaches and teaches the principles of a religion, or a person ordained a minister in accordance with the ceremonies of a church, but who does not regularly, as a vocation, preach the principles of that religion, is not included within the class of persons recognized by law "as regularly and duly ordained ministers of religion." See also *Dickinson v. U. S.*, supra and *Diercks v. U. S.*, (7th Cir.), 223 F.2d 12.

charged from the Naval Reserve for reason of "Convenience of the Government" (File 15).

Appellant on June 4, 1952 was ordered for an armed forces physical examination (File 21) and only after that order, which indicated imminent induction, did he file on July 14, 1952 his Special Form for Conscientious Objector (File 26). He therein claimed objection to both combatant and noncombatant service. It is noted that he claimed he acquired the basis for his conscientious objection belief "Early in '51 . . . had bible study in home and attended meetings at the Kingdom Hall . . ." (File 27). As stated previously, the investigation disclosed no Jehovah Witness activity for this period (File 233).

He made no explanation whatsoever for his failure to assert a claim for conscientious objection in his initial Classification Questionnaire, except to say that he joined the Naval Reserve "Early in '51 along with some school buddies" because "it seemed to be the only thing to do . . ." However, in a second Conscientious Objector form filed by appellant on September 28, 1954 (File 202), appellant alleged he acquired the basis for his conscientious objection belief not "Early in '51" but "from 1949 onward . . ." The investigation disclosed, as stated previously, appellant spent but 7 hours in Jehovah Witness activity in 1949 (File 233).

Regardless of whether appellant acquired his claimed belief in 1949 or early in 1951, he still had no hesitation in joining the Naval Reserve on April 3, 1951, at a time admittedly subsequent to his alleged

indoctrination. Furthermore, at a personal appearance before the Local Board on August 11, 1952, appellant stated he would not be satisfied with a classification as a conscientious objector and requested that he be classified 4-D, that of a minister of religion (File 118).

After receiving the Local Board classification of 1-A on August 11, 1952 (File 12), he wrote a letter dated September 30, 1952 indicating he had changed his mind and requested a personal appearance for the purpose of being classified 1-AO (File 128). Here appellant alleged he was now opposed to combatant service only, and would accept non-combatant service in the armed forces because he was "a law abiding citizen of this country . . ." This was not the only occasion appellant stated he would enter the military service. The file reveals that in an affidavit received by the Local Board on November 17, 1952 (File 144), appellant stated as follows: "That he reiterates his willingness to serve his country in noncombatant service if allowed access to that service without an oath of allegiance."[3]

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[3]These facts are entirely contrary to appellant's assertions on page 25 of his brief that 'All of his papers, and every document supplied by him, staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended he was unwilling to go into the Armed Forces and do anything as a part of a military machine and that his objection was by reason of his religious training and belief."

In a letter dated October 7, 1952 (File 129), a Francis Silliman, under authority of appellant, requested a personal appearance for appellant stating, "Selby is a badly confused young boy. I suggest that you allow me to cite his Form 100 as a case in point. It denotes muddled and incoherent thinking and purpose. There is no direction to it at all." The letter further stated that appellant would be willing to accept a 1-AO classification, noncombatant service and training, if it were offered to him.

Notwithstanding appellant's assertion he would accept a 1-AO classification and enter the armed forces, he advised the Local Board at a personal appearance granted on November 3, 1952 (File 133) that he had again changed his mind, and desired a classification of 1-O, being then opposed to both combatant and noncombatant service. The board justifiably continued appellant in class 1-A on November 3, 1952 (Files 133 and 12).

Here appellant's assertions and conduct are entirely inconsistent, and standing alone provide a reasonable basis for denial of his claim of conscientious objection. As stated in *Witmer v. United States,* supra, on pages 382 and 383:

> "These inconsistent statements in themselves cast considerable doubt on the sincerity of petitioner's claim. This is not merely a case of registrant's claiming three separate classifications; it goes to his sincerity and honesty in claiming conscientious objection to participation in war. It would not be mere suspicion or speculation for the Board to conclude, after denying Witmer's

> now-abandoned claims of farmer and minister, that he was insincere in his claim of conscientious objection. Even firemen become dubious after two false alarms. Aside from an outright admission of deception—to expect which is pure naivety—there could be no more competent evidence against Witmer's claimed classification than the inference drawn from his own testimony and conduct. There are other indications which, while possibly insignificant standing alone, in this context help support the finding of insincerity."

The classification of 1-A of November 3, 1952 was appealed and appellant's file was forwarded to the Appeal Board.[4]

On March 20, 1953 (File 160) the Local Board prepared a memorandum containing information received from appellant's neighbors to the effect that appellant had boasted he was going to be smart and join the Jehovah Witnesses, and make money like some people did in World War II. This memorandum was never considered by the Local Board in classifying appellant, but was forwarded to the Appeal Board subsequent to the transmission of appellant's file on appeal. The procedural error resulted in appellant's acquittal on January 13, 1954 for refusal to submit to induction (File 193).

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[4]Appellant failed to perfect his appeal within the time prescribed by regulation and claimed a mistake on his part; the file discloses that the Director of Selective Service Lewis B. Hershey filed an appeal on his behalf (File 148).

b. Hearing Officer Found Appellant Insincere.

After the defendant's acquittal, he was again classified 1-A by the Local Board on September 13 and October 11, 1954 (File 14). He appealed the classification and the Department of Justice in a letter dated June 7, 1955, recommended to the Appeal Board that appellant's claim of conscientious objection be not sustained. The Hearing Officer, according to the letter of June 7, 1955, found that the "registrant has failed to sustain his claim as a genuine conscientious objector by offering convincing proof as to his sincerity. He further concluded that there is an absence of sincerity in the registrant's claim" (File 229).

The Hearing Officer had appellant's entire file from Selective Service to examine. The file revealed inconsistent statements, reversals of position, claims for successive deferments, and membership in a reserve component of the armed forces. The Hearing Officer had a second opportunity to question appellant, observe his attitude and demeanor, and evaluate his mental attitude and belief. The Hearing Officer concluded well within the standards set forth in the cases of *Witmer v. United States, White v. United States,* and *Tomlinson v. United States,* supra, that appellant's claim for conscientious objection was insincere.

c. Objection to Any Governmental Service.

Appellant, according to the Department's letter of June 7, 1955 "told the Hearing Officer that if he were classified 1-O, he would be unwilling to engage in

civilian work for the Government, because to perform such a non-military service would be 'breaking his covenant with God, and would be a compromise of his covenant.' He added that although Jehovah Witnesses are not pacifists, they are opposed to war in any form and regard themselves as 'apart from the world and will have nothing to do with it, because the world is going to be destroyed.' "

Unquestionably what appellant is objecting to is service of any kind on behalf of a governmental agency. Appellant's conscientious objection is much broader than the one recognized by statute since it is in effect an objection to any governmental service whatever. Although admittedly appellant was not entitled to exemption as a minister, he indicated that even if given a conscientious objector classification of 1-O, he could not perform civilian work in lieu of induction if ordered to do so.[5]

As stated in *White v. United States,* supra, "Objection to serving a country, even on religious grounds, is not the standard under the statute." The court stated on page 785 as follows:

> "The language of the Act refers to a person 'who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.' There was evidence that White did not precisely fall into this category. For his con-

[5]A conscientious objector is subject to obligations under the Selective Service Act, the only difference being that he must serve his country in civilian work contributing to the maintenance of the national health, safety and interest in lieu of service and duty in the armed forces. *Niles v. United States,* (9th Cir.) 122 F. Supp. 383, 220 F.2d 278, cert. den. 349 U.S. 939.

> scientious objection was a broader one,—it was an objection to any governmental service whatever . . . After his appeal had been denied he wrote to the local board: 'Now if I go ahead and put my efforts toward doing governmental work, I will not be able to carry out my covenant obligations to God . . . I hope you can realize why I want to be exempted from being forced to do government work or being drafted into the armed forces.' He spoke of his belief that he 'should have no part in the doings of this old world even though (he) may be prosecuted for it.' . . . Thus, these boards might with reason conclude that they dealt with a registrant whose primary conscientious objection is to governmental activity."

The Appeal Board ultimately classified appellant 1-A on August 18, 1955. The Appeal Board had a basis in fact for denying the claim of concientious objection. Not only did it have the conclusion of the Hearing Officer that appellant's claim was insincere, and before whom the appellant personally appeared, but it could rely on the objective facts contained in appellant's entire file. Additionally, appellant had appeared before the Local Board for personal appearances on three occasions and had failed to convince the Board that he was a conscientious objector. There is both here a subjective and objective basis upon which to deny the claim of conscientious objection.

d. Appellant's Argument.

Appellant's argument concerning the Naval Reserve discharge is without merit. To enlist in a component of the armed forces requires a voluntary act

and is considered a privilege. Although the Navy was not compelled to discharge appellant, he was released apparently because of his assertion of conscientious objection.

The Naval Reserve did not presume to decide whether appellant was subject to induction through the processes of the Selective Service System, but only found he was not entitled to reenlistment. In any event, it is the Local Board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed.

Selective Service Regulation, 1622.1(c);
Universal Military Training and Service Act, Section 10(b)(3).

Appellant complains that a "glaring" omission appears in the Department of Justice recommendation to the Appeal Board of June 7, 1955 (File 227). He states that the Department's letter fails to include the comment of the Hearing Officer that appellant "has lived a clean and moral life."

A copy of the Hearing Officer's actual report, not a part of appellant's Selective Service file, but which was the basis of the Department's recommendation of June 7, 1955 was introduced as Government's Exhibit 2 in evidence without objection of appellant (Tr. 72). An examination of the report indicates the Department's summary of it was fair and inclusive.

Whether appellant has lived a "clean and moral life" is not an issue here, and, moreover, no claim is made to the contrary.

However, we agree with appellant's associate, that appellant is a "badly confused young boy" whose claims and assertions "denotes muddled and incoherent thinking and purpose" (File 129).

(3) Judicial Review is Confined to Determination of Whether Basis in Fact Exists for Denial of Conscientious Objector Claim.

Any exemption from military service because of conscientious objection to war is granted as a matter of grace.

Therefore, in the absence of a clear invasion of constitutional right, the courts have confined judicial review to a determination of whether there is any evidence or a basis in fact in the file of the registrant to support the classification.

Richter v. United States (9th Cir.) 181 F.2d 591 cert. den. 340 U.S. 892;

Uffelman v. United States (9th Cir.) 230 F.2d 297;

Campbell v. United States, supra.

As stated in *Witmer v. United States,* supra, at pages 380 and 381:

> "It is well to remember that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson v. United States,* 346 U.S. 389, 396 (1953). The classification can be overturned only if it has 'no basis in fact.' *Estep v. United States,* 327 U.S. 114, 122 (1946)."

CONCLUSION.

For the above reasons, the United States submits that no error has been shown in the conviction of appellant. He has received a fair trial and was properly convicted. A clear, convincing and substantial basis in fact existed for the classification of 1-A of appellant by the Appeal Board.

The judgment should be affirmed.

Dated, San Francisco, California,
July 17, 1957.

LLOYD H. BURKE,
United States Attorney,
DONALD B. CONSTINE,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

STATUTE

Section 6(j), Universal Military Training and Service Act, 50 U.S.C. App. 456(j) provides:

Conscientious objectors. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any

such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12

of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

No. 15381

United States
Court of Appeals
for the Ninth Circuit

EARL G. ARONSON, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of said Estate and Earl G. Aronson, surviving husband and Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., surviving children of said decedent,

Appellants,

vs.

GEORGE A. McDONALD, Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska, Fourth Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-13-57

No. 15381

United States
Court of Appeals
for the Ninth Circuit

EARL G. ARONSON, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of said Estate and Earl G. Aronson, surviving husband and Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., surviving children of said decedent,

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Transcript of Record

Appeal from the District Court for the District of Alaska,
Fourth Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Defendant and Appellee.

In the District Court for the District of Alaska, Fourth Division, Territory of Alaska

No. 7728

EARL G. ARONSON, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of the said Estate of Flora Ritta Mae Aronson and Earl G. Aronson, surviving husband, and Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., surviving children of said decedent, Plaintiff,

vs.

GEORGE A. McDONALD, Defendant.

COMPLAINT

Now Comes the Plaintiff above-named and, for cause of action against the Defendant above-named, complains and alleges as follows:

I.

That the Plaintiff is the duly appointed, qualified and acting Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, and that Letters of Administration upon said estate have been issued to him out of, and under the seal of, the Probate Court for Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, on the 5th day of October 1953, a certified copy of which letters is attached hereto and made a part hereof; that Plaintiff has

been duly authorized and directed to file this claim on behalf of the said estate by the said Probate Court by an order heretofore entered in said Probate Court.

II.

That the said decedent, Flora Ritta Mae Aronson, left as her sole surviving heirs at law the following:

Earl G. Aronson	Husband
Earlene A. Roberts	Daughter
Betty C. Howard	Daughter
Earl G. Aronson, Jr.	Son

III.

That on the 30th day of July, 1953, the said Mrs. Aronson, now deceased, was riding as a passenger in an automobile owned by the Defendant, George A. McDonald, and which automobile was being operated by Mrs. Naomi McDonald, the wife of the said Defendant, on the Richardson Highway between the Copper Center Roadhouse and Valdez, Alaska, and which automobile was proceeding in a southerly direction toward Valdez, Alaska. At about the 57-Milepost on said Richardson Highway, out of Valdez, Alaska, the hydraulic brakeline of the said automobile broke, and all of the brake fluid was lost, leaving the automobile without adequate brakes.

IV.

In addition to the Plaintiff's intestate, there were in said automobile at said time, Mrs. Dickerson, Mrs. Andy Hall, and George A. McDonald, Jr. That after the break in the hydraulic line, the Plain-

tiff's intestate and Mrs. Dickerson wanted to have the damage repaired and wanted to come home to Fairbanks; however, Mrs. McDonald insisted upon proceeding toward Valdez, and in attempting to cross Thompson Pass, about twenty (20) miles from Valdez, the automobile started down a long grade and, without brakes, gained momentum and could not be stopped; the said automobile left the highway, going at a terrific rate of speed, and turned over several times. The Plaintiff's intestate, Mrs. Andy Hall and Mrs. McDonald were killed in said accident.

V.

That the automobile in question was a 1953 Dodge V-8, bearing Alaska License No. 40758, and was owned by the said Defendant and was being operated by the Defendant's wife at the special instance and request and with full consent of the said Defendant, the owner of said automobile as aforesaid.

VI.

That the foregoing accident was caused by the careless and negligent operation of the Defendant's automobile by the Defendant's wife, and that the death of the Plaintiff's intestate was caused solely by the negligence of the Defendant's wife and without any negligence on the part of the Plaintiff's intestate.

VII.

That by reason of the said death of the Plaintiff's wife and intestate, as aforesaid, the said Plaintiff and his children have been deprived of the

society, services and comfort of their wife and mother, to the great loss and damage of the said Plaintiff in the sum of Fifteen Thousand Dollars ($15,000.00).

Wherefore, the Plaintiff prays judgment against the above-named Defendant in the sum of Fifteen Thousand Dollars ($15,000.00) together with reasonable attorney's fees and costs.

/s/ MAURICE T. JOHNSON
Attorney for Plaintiff.

Duly Verified.

In the Probate Court for Fairbanks Precinct, Fourth Judicial Division Territory of Alaska

No. 1647 Probate

In the Matter of the Estate of FLORA RITTA MAE ARONSON, Deceased. EARL G. ARONSON, Administrator.

LETTERS OF ADMINISTRATION

Territory of Alaska
Fourth Division
Fairbanks Precinct—ss.

To All Persons To Whom These Presents Shall Come, Greeting:

Know Ye, that it appearing to the Commissioner of the above Fairbanks Precinct, Fourth Division, Territory of Alaska, that said Flora Ritta Mae

Aronson has died intestate, leaving at the time of her death property in this Territory, such Commissioner has duly appointed Earl G. Aronson to administer the Estate of Flora Ritta Mae Aronson, Deceased. This, therefore, authorized the said Earl G. Aronson to administer the Estate of Flora Ritta Mae Aronson, Deceased, according to law.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of this Court this 5th day of October, 1953.

[Probate Seal]

/s/ LaDESSA NORDALE
United States Commissioner and Ex-Officio Probate Judge

Certification Attached.

[Endorsed]: Filed October 7, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now defendent, and for his answer to the complaint of plaintiff, admits, denies and alleges as follows:

First Defense

That the complaint of plaintiff fails to state a claim against defendant for which relief can be granted.

Second Defense

I.

Defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Defendant has no information as to the allegations contained in paragraph II of plaintiff's complaint sufficient from which to form a belief and therefore denies the same.

III.

Defendant admits the allegations contained in paragraph III of plaintiff's complaint, except said brakeline broke about 57-Mile post on said Richardson Highway; and affirmatively alleges that such damage occurred about 70-Milepost on said highway.

IV.

For answer to paragraph IV of said complaint defendant denies that plaintiff's intestate and Mrs. Dickerson wanted to have the damage repaired and wanted to come to Fairbanks, and denies that Mrs. McDonald insisted upon proceeding toward Valdez.

V.

For answer to paragraph V of said complaint defendant denies that his automobile was being operated at his special instance and request; and affirmatively alleges that said automobile was then being used by his wife with his permission for her own personal pleasure and that of her friends and guests.

VI.

For answer to the allegations contained in paragraphs VI and VII of said complaint defendant denies the same and the whole thereof.

Third Defense

That the accident, injuries, death and damage complained of were due to and caused by the fault, carelessness and negligence of the deceased, Flora Ritta Mae Aronson, in this:

a) That deceased, defendant's wife and others were using defendant's automobile, voluntarily, for a pleasure trip jointly undertaken by deceased, Mrs. Dickerson, Mrs. Andy Hall, and George A. McDonald, Jr., for their own amusement; and as a consequence had journeyed from Fairbanks to Anchorage, thence to Seward and return to Anchorage. While enroute from Anchorage on the return trip to Fairbanks, it was agreed that the party also take a side trip to Valdez.

b) That shortly after leaving the Glenn Allen Highway on the side trip to Valdez, and at a point about 70 miles north of Valdez the car struck a rock on a piece of road under construction, rupturing a hydraulic brake fluid line, causing the loss of all brake fluid, and leaving the car without effective foot brakes. That the automobile was there stopped; and driven onward by defendant's wife only after passing motorists advised that repairs could be made at 57-Mile Roadhouse located 57 miles north of Valdez, and with the concurrence

and consent of the entire party, including Mrs. Aron. That at that point Mrs. Aronson could have left said vehicle.

c) That the party then proceeded to said 57-Mile Roadhouse at which point they stopped and were advised that the repairs required could not be there made, nor at any place closer than Valdez. That none of the persons in the party had been to Valdez or had any personal knowledge of the terrain ahead. That they were told at said roadhouse that they had "passed the worst part" of the road. That the party proceeded toward Valdez with the concurrence and consent of all, including Mrs. Aronson. Mrs. Aronson could have left said vehicle at this point also.

d) Some 15 miles later mountain country was encountered, and Mrs. McDonald was permitted without objection to proceed at night, in fog often dense, and ascend a steep mountain pass. That the party stopped on the summitt of said pass, called Thompson's Pass, at a point about 25 miles north of Valdez, and there discussed whether to wait out the night and fog or to go forward. It was the decision of those in the party, including Mrs. Aronson, to proceed toward Valdez. No person took exception to this decision. Mrs. Aronson at this point also could have left said vehicle.

e) That several miles closer to Valdez, and on a steep grade, the emergency brake burned out in attempting to slow the vehicle and the vehicle plunged down the slope and off the roadway out of control.

That at all times mentioned in the complaint defendant's wife operated said vehicle carefully, prudently and skillfully, and is and was without negli-

gence, save and except only in the exercise of judgment to proceed with defective brakes; and in this respect Mrs. Aronson knew, or in the exercise of reasonable care should have known, of the hazards of using said vehicle without brakes, but nevertheless voluntarily concurred in such continued operation, and voluntarily went forward with said party. That any negligence on the part of defendant's wife was open, apparent to and known to Mrs. Aronson, prior to said accident, and that she voluntarily assumed the risk of injury resulting from the continued use of said vehicle without brakes, and the methods of operation thereof by defendant's wife. That the acts of Mrs. Aronson, aforesaid, proximately contributed to and caused the accident resulting in her death.

Wherefore, having fully answered the complaint of plaintiff, defendant prays that plaintiff take nothing thereby, that the same be dismissed, and that defendant have and recover of plaintiff his costs and disbursements herein, including a reasonable attorney's fee.

COLLINS AND CLASBY
/s/ By CHARLES J. CLASBY
Attorney for Defendant

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 25, 1954.

[Title of District Court and Cause.]

TRIAL BY COURT

The plaintiff was represented by Maurice T. Johnson; the defendant by Chas. J. Clasby and Charles Cole.

Mr. Johnson moved the Court for the permission of the Court to amend the complaint herein on Page 3, Paragraph 7, by striking the figures $15,000.00 and inserting in lieu thereof $50,000.00, and to amend the prayer by the same amendment as above and presented argument.

Mr. Clasby resisted the Motion.

The Court reserved his ruling until after trying out the matter of negligence liability if the respective counsel agree thereto and counsel stated no objection.

Mr. Johnson presented an opening statement to the Court followed by Mr. Clasby for the defendant.

Earl G. Aronson was duly sworn and testified in his own behalf.

The trial of this cause was continued until 2:00 p.m.

Entered in Court Journal, No. 56, Page 116, Oct. 8, 1956.

[Title of District Court and Cause.]

TRIAL BY COURT—(Cont.)

Came the plaintiff and the respective counsel as heretofore and the trial of this cause was resumed.

The Court having given permission to the plaintiff to reopen his case in chief, Mrs. John Dickerson, previously sworn, testified further for the plaintiff.

The trial of this cause was continued until 2:00 p.m.

Recess to 2:00 p.m.

2:00 p.m.

Came the plaintiff and the respective counsel as heretofore and the trial of this cause was resumed.

James Hutchinson, Jr., previously sworn, testified further in behalf of the plaintiff.

Emmett Potelko was duly sworn and testified for the plaintiff.

The plaintiff rested.

Mr. Clasby renewed his Motion for the dismissal and presented argument on the matter of negligence.

Mr. Johnson resisted the Motion, presenting argument.

Recess to 4:00 p.m.

The Court being fully advised in the premises, it was Ordered that the Motion of the defendant to dismiss be granted and stated his reasoning therein.

It was Ordered furthermore that the Motion of the plaintiff to increase the amount asked as damages be denied.

Entered in Court Journal, No. 56, Page 123, Oct. 11, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on duly and regularly for trial before the above entitled Court without a jury, commencing on the 8th day of October, 1956, the plaintiff being present in person by Earl G. Aronson, and by his counsel, Maurice T. Johnson, and the defendant appearing by his attorneys, Collins, Clasby & Sczudlo, Charles J. Clasby of counsel; and the plaintiff having introduced evidence, and rested; and defendant having moved for the entry of a judgment of dismissal on the law and on the facts; and plaintiff, having been permitted to reopen his case in chief, submitted further evidence and again rested; and defendant having renewed his motion this court ruled as a matter of law that the statutes in Alaska do not prevent the recovery of a husband for the torts of his wife within the scope of the "Family Purpose Car Doctrine"; then examined the testimony of witnesses, the exhibits and being fully advised in the premises, makes the following, pursuant to Rule 52 and 41(b) FRCP:

Findings of Fact

I.

That plaintiff is the administrator of the Estate of Flora Ritta Mae Aronson, deceased. That he instituted this action under authority by the Probate Court having jurisdiction over said estate as nom-

inal plaintiff for the benefit of himself as surviving husband and for the benefit of Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., children of decedent.

II.

That on or about the 30th day of July, 1953, plaintiff's intestate was killed in an automobile accident occurring near Thompson's Pass on the Richardson Highway about 23 miles north of Valdez, Alaska.

III.

That at the time of the accident the automobile involved therein was owned by the defendant George A. McDonald. This automobile was then operated by Naomi McDonald. That Naomi McDonald was then the wife of defendant.

IV.

That plaintiff's intestate was then a passenger in said automobile engaged with Naomi McDonald, now deceased, her son, George, Jr., Mrs. Andrew Hall, now deceased and Mrs. John T. Dickerson, in a pleasure trip from Fairbanks to Seward and return via Valdez.

V.

That approximately 50 miles prior to the location of the fatal accident defendant's automobile struck an obstruction in the roadway in such manner as to burst a hydraulic brake line resulting in the loss of all braking control over the automobile except for

a parking brake. This occurred through no fault of the operator.

VI.

The operator of the vehicle then proceeded to drive toward Valdez, Alaska, without brakes, in the nighttime, and on a road unfamiliar to her or to any passenger after consultation with her guests, without objection by her guests and with the consent of her guests, including plaintiff's decedant. That the party stopped at a roadhouse at 57 mile seeking repairs; and again proceeded onward without objection by and with the consent of decedant's intestate. That the party encountered heavy fog and stopped by the road at a point on or near the summit of Thompson's Pass. That again the party proceeded forward without objection by and with the consent of decedant's intestate.

VII.

That the operator of the vehicle encountered a long descent unknown to her and upon which she was unable to control the vehicle with the hand brake. That the hand brake burned out and the vehicle accelerated by gravity on the descent to a speed causing the vehicle to leave the roadway and overturn. That the proximate cause of the accident and the fatal injuries to plaintiff's intestate was the operation of said vehicle without brakes.

VIII.

That said vehicle was in all other respects being

operated by defendant's wife with the exercise of ordinary care; and that defendant's wife was in no other respect negligent.

From the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That defendant's wife, Naomi McDonald, was negligent in operating a vehicle without brakes; and that said negligence was one of the proximate causes of the fatal injuries to plaintiff's decedant.

II.

That plaintiff's decedant was contributorily negligent in continuing to ride in said vehicle so operated without remonstrance or objection, and became a co-adventurer in, or assumed the risk of proceeding in the face of the danger and peril inherent in such operation of said vehicle under the conditions and circumstances, which negligence on her part contributed as one of the proximate causes of her fatal injuries, the same being a peril within the area of the risk assumed.

III.

That defendant is entitled to a judgment of dismissal with prejudice and with costs against the beneficiary plaintiffs Earl G. Aronson, Earl G. Aronson, Jr., Earlene A. Roberts and Betty C. Howard.

Done at Fairbanks, Alaska, this 23rd day of October, 1956.

/s/ VERNON D. FORBES,
District Judge

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 23, 1956.

In the District Court for the District of Alaska,
Fourth Division

No. 7728

EARL G. ARONSON, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased,
Plaintiff,

vs.

GEORGE A. McDONALD, Defendant.

JUDGMENT

This matter having come on duly and regularly for trial before the above entitled Court without a jury, commencing on the 8th day of October, 1956, the plaintiff being present in person by Earl G. Aronson, and by his counsel, Maurice T. Johnson, and the defendant appearing by his attorneys, Collins, Clasby and Sczudlo, Charles J. Clasby of counsel; and the plaintiff having introduced evidence, and rested; and defendant having moved for the entry of a judgment of dismissal on the law and on the facts; and plaintiff, having been permitted to reopen his case in chief, submitted further evidence

and again rested; and defendant having renewed his motion this court ruled as a matter of law that the statutes in Alaska do not prevent the recovery of a husband for the torts of his wife within the scope of the "Family Purpose Car Doctrine"; then examined the testimony of witnesses, and the exhibits and being fully advised in the premises; and having heretofore caused to be made and filed herein its Findings of Fact and Conclusions of Law, Now Therefore

It Is Hereby Ordered, Adjudged and Decreed that this action be and the same is hereby ordered dismissed with prejudice, and plaintiff take nothing thereby.

It Is Further Ordered that defendant have and recover of Earl G. Aronson, Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr. his costs and disbursements herein to be taxed by the Clerk of this Court in the sum of $174.00, and an attorney's fee hereby fixed by the court in the sum of $500.00.

/s/ VERNON D. FORBES,
District Judge

Entered in Court Journal, No. 56, Page 171, Oct. 23, 1956.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 23, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Now comes the Plaintiff above named, by Maurice T. Johnson, his attorney, and under the provisions of Rule 15, Uniform Rules of the District Court for the District of Alaska, effective January 28, 1956, respectfully moves the Court for a new trial upon the following grounds:

1. Insufficiency of the evidence to justify the decision and that the decision is contrary to law.

(a) That Findings of Fact No. VI, VII and VIII are entirely unsupported by the evidence and against the law.

(b) That the Conclusions of Law No. I, II, and III are erroneous and not justified by the evidence or by the law.

2. Errors in law occurring at the trial.

(a) The Court erred in not permitting the admission in evidence of Plaintiff's Identification 5, being a map of the United States Geological Survey, which map was testified to by the witness, Emmet M. Botelho.

(b) The Court erred in disallowing the Plaintiff's motion to amend the complaint to increase the amount of damages claimed.

(c) The Court erred in entering a personal judgment against Earl G. Aronson, Earl G. Aronson, Jr., Earlene A. Roberts and Betty C. Howard for costs when the action was brought by Earl G. Aronson in his official capacity as administrator, and

any judgment for costs should have been against the estate which he represented.

This Motion is based upon the transcript of the proceedings filed herein, upon the deposition of the witness, George A. McDonald, Jr., and upon the memorandum in support thereof filed herewith.

Dated at Fairbanks, Alaska, this 31st day of October, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Plaintiff

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 31, 1956.

[Title of District Court and Cause.]

ORDER RE NEW TRIAL

The Plaintiff was represented by Maurice T. Johnson; the defendants by Charles J. Clasby.

A Motion for a New Trial having been filed, Mr. Johnson waived any oral argument, submitting the matter on the Briefs therein.

The Court being fully advised in the premises, it was Ordered that the Motion for a New Trial be denied.

Entered in Court Journal, No. 56, Page 216, Nov. 9, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the above entitled Court, entered in this case on the 23rd day of October, 1956, and from the Order denying Plaintiff's motion for new trial entered by the above entitled Court on November 9, 1956.

Dated at Fairbanks, Alaska this 19th day of November, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 19, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, That we, Earl G. Aronson, Administrator, as Principal and Andrew J. Hall, and Ina B. Tell, as Sureties, are held and firmly bound unto George A. McDonald, Defendant, in the full and just sum of $1,000.00, to be paid to the said George A. McDonald, Defendant, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of November, 1956.

Whereas, lately at a District Court of the United States for the District of Alaska, Fourth Judicial Division, in a suit depending in said Court, between the plaintiff above named and the defendant above named, a Judgment was rendered against the said Plaintiff above named, and a Motion for New Trial by the Plaintiff having been overruled, and the said Plaintiff having filed in said Court a Notice of Appeal to reverse the Judgment in the aforesaid suit on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Plaintiff above named shall prosecute his appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

[Seal] /s/ MAURICE T. JOHNSON,
Notary Public in and for Alaska. My Commission expires: 4/17/60.

[Seal] /s/ EARL G. ARONSON,
Principal Administrator

[Seal] /s/ ANDREW J. HALL,
Surety

[Seal] /s/ INA B. TELL,
Surety

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Andrew J. Hall and Ina B. Tell, being duly sworn, each for himself deposes and says, that he is a freeholder in said District, and is worth the sum of $1,000.00, exclusive of property exempt from execution, and over and above all debts and liabilities.

/s/ ANDREW J. HALL

/s/ INA B. TELL

Subscribed and sworn to before me, this 19th day of November, 1956.

[Seal] MAURICE T. JOHNSON,
Notary Public in and for Alaska. My Commission expires: 4/17/60.

Examined and Approved:

/s/ VERNON D. FORBES,
District Judge

[Endorsed]: Filed Nov. 19, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Pursuant to the provisions of the Federal Rules of Civil Procedure and of the United States Court of Appeals for the Ninth Circuit, the Appellant herewith states the points on which he intends to rely in this appeal, as follows:

1. The Trial Court erred in disallowing Appellant's Motion to Amend Complaint to increase the amount of damages.

2. The Trial Court erred in refusing the admission in evidence of Appellant's Identification 5.

3. The Trial Court erred in entering judgment in favor of the Appellee, and particularly erred in adopting Findings of Fact Nos. VI, VII and VIII.

4. The Trial Court erred in adopting Conclusions of Law Nos. I, II and III.

5. The Trial Court erred in entering a personal judgment against the Appellant.

Dated at Fairbanks, Alaska this 28th day of November, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 28, 1956.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Pursuant to the Federal Rules of Civil Procedure and pursuant to the rules of the United States Court of Appeals for the Ninth Circuit, the Appellant hereby designates the following parts of the record as those he thinks necessary for the consideration of this Appeal:

1. Complaint.
2. Answer.
3. Plaintiff's Motion to Amend Complaint, October 8, 1956, shown in Journal No. 56, page 116.
4. Deposition of George McDonald, Jr.
5. Transcript of testimony.
6. Appellant's Exhibits A, B, and C, and Identification 5.
7. Order denying Plaintiff's Motion to Amend Complaint to increase amount of damages, entered October 11, 1956, Court Journal 56, page 123.
8. Findings of Fact and Conclusions of Law.
9. Final Judgment.
10. Appellant's Motion for New Trial.
11. Order denying Appellant's Motion for New Trial, November 9, 1956, Court Journal 56, page 216.
12. Appellant's Supersedeas Bond.
13. Notice of Appeal.
14. Statement of Points on Appeal.
15. This Designation of Record.

Dated at Fairbanks, Alaska, this 28th day of November, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 28, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the list below comprises all proceedings in this cause listed on the Designation of Record of the plaintiff and appellant, viz:

1. Complaint.
2. Answer.
3. Motion to amend Complaint contained in minute order of the Trial.
4. Order denying Motion to amend Complaint contained in record of Trial.
5. Finding of Fact and Conclusions of Law.
6. Judgment.
7. Motion for New Trial.
8. Order denying New Trial.
9. Appellant's Supersedeas Bond.
10. Notice of Appeal.
11. Statement of Points on Appeal.

12. Designation of Record.

Appellants' Exhibits "A", "B", "C", and Identification No. 5, in brown manila envelope.

Deposition of George McDonald, Jr., separately bound.

Transcript of Proceedings at Trial, separately bound.

Witness my hand and the seal of the above-entitled Court this 6th day of December, 1956.

[Seal] /s/ JOHN B. HALL
Clerk of Court.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Fairbanks, Alaska, October 8, 1956

Appearances: Maurice T. Johnson, Esq., of Fairbanks, Alaska, Attorney for Plaintiff. Charles J. Clasby, Esq., and Charles Cole, Esq., of Fairbanks, Alaska, Attorney for Defendant.

Before: Honorable Vernon D. Forbes, District Judge.

Be It Remembered, that the trial of this cause was commenced at 10 a.m., October 8, 1956, plaintiff and defendant both represented by Counsel, the Honorable Vernon D. Forbes, District Judge, presiding. [2] *

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Court: Are the parties and counsel ready to proceed with Civil Cause 7728, Earl G. Aronson v. George A. McDonald?

Mr. Clasby: The defendant is ready.

Mr. Johnson: The plaintiff is ready.

The Court: Is there anything that can be accomplished prior to the calling of witnesses?

Mr. Johnson: If the Court please, before proceeding I should like to move on behalf of the plaintiff to amend the complaint on its face by interlineation on page three in paragraph VII, the last line, strike the words and figures "Fifteen Thousand Dollars ($15,000.00)" and substitute in lieu thereof "Fifty Thousand Dollars ($50,000.00)."

Now, as a basis for making this motion, we believe first that the Federal Rules of Civil Procedure —I think Rule 15 covers the matter of making amendments.

The action was brought originally under Section 61-7-3, Alaska Compiled Laws Annotated, 1949, as amended by Chapter 89, Session Laws of Alaska, 1949. This section, in 1955 by the Legislature then convened, was amended again, and this amendment is found in Chapter 153, Session Laws of Alaska, 1955. The amendment relates largely to the amount of recovery; in fact, the first portion of the amended section reads exactly the same except that it provides that the damages shall not exceed $50,000, and then there is an addendum at the end of the amendment which sets up specifically what may be shown by way of losses in [3] connection with an action for death by wrongful act.

It is our contention that this amendment simply amends a remedial statute; that it does not change any cause of action or does not change any vested right, because damages are not a vested right in either the plaintiff or defendant until after they have been liquidated and found by a definite judgment. In support of our position we would like to call attention to Section 482, 50 American Jurisprudence, page 505, under the general heading "statutes," and under the specific section heading of "Remedial Statutes," and this section provides that:

"A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past. Hence, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. To the contrary, statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence [4] of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then pending."

And there are cases cited in the footnotes on that general statement.

We also wish to rely on a case in the Ninth Circuit, known as United States v. Standard Oil Co. of California, et al. The opinion is found in 21 Fed. Supp. 645. This opinion was by Judge Yankwich, in the Southern District of California. It is very extensive and covers this particular subject rather fully. Judge Yankwich's opinion was affirmed by the Ninth Circuit Court of Appeals in 107 Fed. 2d, on page 402. Subsequently a petition for writ of certiorari was filed in the United States Supreme Court, which was denied in 309 U.S. 673, and further a rehearing on this petition was denied (309 U.S. 697).

As we have tried to point out, the matter of assessment of damages or the amount of damages recoverable we feel is simply a matter of remedy and does not constitute any vested right, and that is the gist of the opinion that we have just cited, United States v. Standard Oil, and in this instance there was no change in the statute other than that they raised the amount recoverable to $50,000, and we feel that that does not add to or take away any right that either the plaintiff or defendant may have had previously, and for that reason, while at the time this case was filed the limit was $15,000, we feel now that it [5] is perfectly proper to amend the complaint to $50,000.

The Court: Mr. Clasby.

Mr. Clasby: May it please the Court, an amendment such as counsel seeks doesn't come very timely

at the moment of trial; however, pertinent to the merits of his motion, the same problem was considered by this Court in quite detail in the case of Simmons v. Wien, wherein a similar motion was made to amend the complaint and was rejected by this Court. At that time there was cited to the Court as authority for the motion the Standard Oil Case. The Standard Oil Case was by the Court thoroughly examined and rejected as authority for the moving party's contention that this statute is one that can be applied retrospectively.

I do not have before me the brief we submitted in the Wien case, but we submitted substantial authority by Courts interpreting the applicability of changes of this sort in wrongful death statutes, and uniformly the Courts held that the wrongful death statute creating new right, one that did not exist, that the statute says $5,000 or $10,000, that is the measure of the right that is created by the statute, and when the statutes are changed enlarging the amount, a new right is being thereby created and is applicable only to injuries occurring after the new statute.

I do not recall the facts of the Standard Oil case sufficiently to be able to distinguish it for the Court on the facts. I do recall the case sufficiently to note to the Court [6] that the Standard Oil case was not a wrongful death statute case. Accordingly, at this moment, and without opportunity by earlier motion to go into it more exhaustively, we rest for our resistance of the motion on the ruling of this Court in the case of Simmons v. Wien.

The Court: It is true that this same question has been previously before the Court, and at that time I looked into it carefully and made what I considered to be a proper ruling.

I do not wish to foreclose any additional arguments on the part of counsel and will certainly permit other cases to be shown. I know that the Ninth Circuit Case, United States v. Standard Oil was before me at the time I formerly ruled. Whether I was right or wrong in that ruling, I don't know. I have two or three things in mind at this time: first, whether the motion is timely; if it is, whether it is meritorious; and the third proposition that I have in mind may be moot, depending on what develops. I can see no harm to be done to any of the parties if I should reserve the ruling at this time, and I was about to suggest that we might try out the question of liability in the case before us for trial and, if liability is established, then of course the ruling would be very germane.

Do counsel have any objection to trying out the question of liability, restricting all evidence to the question of liability first and, if liability is established, then we can go into damages. [7]

Mr. Clasby: We have no objection to that procedure.

Mr. Johnson: Neither do we, your Honor. However, there is in that connection a deposition which we understand has been mailed from Beaumont, Texas—I believe you said Saturday evening, is that correct?

Mr. Clasby: That is what I understand.

Mr. Johnson: It ought to be here today, and so far as we are concerned, we were represented at the taking of that deposition, although it was taken at the request of the defendant, we were represented and from the indications that we have received from our correspondent in Beaumont we believe that the deposition would be necessary, particularly on the question of negligence and, if that isn't here by the time we are through with such testimony as we have to offer at the moment, why, we would like to be able to hold the matter over until that deposition comes in.

The Court: We can take that up if we come to that point, but are you ready to proceed now and is it agreeable to restrict the evidence first to the question of liability?

Mr. Johnson: Yes, sir.

The Court: Very well.

Mr. Johnson: There are certain matters, however, that we would like to put in the record to begin with which do not bear exactly on the question of liability, such as the appointment of an administrator and things of that sort.

The Court: I think we should attempt to narrow the issues at this time as much as possible. [8]

Mr. Johnson: We have certified copies of the documents upon which we will rely and are ready to offer those:

The certified copy of letters of administration, the certified copy of the order directing him to file this suit, and a certified copy of the death certificate.

Mr. Clasby: We have admitted the allegations in paragraph one.

Mr. Johnson: I realize that, but I do believe that the record, to make it complete, should disclose these matters.

The Court: You may have them marked for identification and show them to opposing counsel for his examination.

Mr. Johnson: Thank you.

Clerk of Court: Plaintiff's Identifications No. 1, No. 2, and No. 3.

(The documents above referred to were marked Plaintiff's Identifications No. 1, 2, and 3, respectively.)

Mr. Johnson: If the Court please, we have Plaintiff's Identification No. 1, which is a certified copy of the death certificate of the plaintiff's intestate.

Mr. Clasby: We have no objection to its admission for the purpose of showing the death of the plaintiff's intestate.

The Court: That is the purpose of your offer, is it?

Mr. Johnson: Yes, your Honor.

The Court: Very well. It will be received for that purpose. [9]

Clerk of Court: Plaintiff's Exhibit A.

(Certified copy of death certificate of plaintiff's intestate was received in evidence as Plaintiff's Exhibit A.)

Mr. Johnson: We would like to offer Plaintiff's Identification 3, which is a certified copy of the

letters of administration showing the appointment of plaintiff as administrator.

Mr. Clasby: We have no objection.

The Court: It may be received.

Clerk of Court: Plaintiff's Exhibit B.

(Certified copy of letters of administration was received in evidence as Plaintiff's Exhibit B.)

Mr. Johnson: We would like to offer Plaintiff's Identification 2, which is a certified copy of an order authorizing the administrator to bring this action.

Mr. Clasby: No objection.

The Court: Very well, it will be received.

Clerk of Court: Plaintiff's Exhibit C.

(Certified copy of order authorizing the administrator to bring action was received in evidence as Plaintiff's Exhibit C.)

Mr. Johnson: Does the Court wish counsel to make an opening statement, or do you prefer to proceed with testimony?

The Court: You may make a brief opening statement. I think I am rather familiar with the theory [10] of both the plaintiff and the defendant, but you may make a brief statement if you wish.

(Thereupon Mr. Johnson made an opening statement to the Court in behalf of the plaintiff.)

(Thereupon Mr. Clasby made an opening statement to the Court in behalf of the defendant.)

Transcript of Testimony of Witnesses

Mr. Johnson: Mr. Aronson, will you take the stand, please?

EARL G. ARONSON

the plaintiff, took the stand in his own behalf, and after being first duly sworn, testified as follows:

Mr. Johnson: If the Court please, it is my understanding that you still wish us to proceed solely on the theory of negligence and to offer no proof at all in the way of damages; is that correct?

The Court: Yes, unless you think that it would prejudice your case in some manner or the defendant thinks so, we will try out the issue of negligence first.

Mr. Johnson: I see no reason why that wouldn't be perfectly permissible and so far as we are concerned we have no objection. The only thing is: should the question of negligence be resolved in favor of the plaintiff, then we would reserve the right to recall the witnesses for such purpose.

The Court: Certainly.

Direct Examination

Q. (By Mr. Johnson): State your name, please.

A. Earl Aronson.

Q. Are you Earl G. Aronson? A. Yes, sir.

Q. The plaintiff in this case? A. Yes, sir.

Q. And I believe you are the duly appointed, qualified and acting administrator of the estate of Flora Ritta Mae Aronson; is that correct?

A. Yes, sir.

(Testimony of Earl G. Aronson.)

Q. Mrs. Flora Ritta Mae Aronson was your wife; is that correct? A. Yes, sir.

Q. I believe she was killed in an accident that happened on or about the 30th day of July, 1953?

A. Yes, sir.

Q. In an automobile owned by George A. McDonald?

Mr. Clasby: To which we object, if the Court please. It isn't the way to prove ownership.

The Court: In view of the objection, I will sustain the objection.

Q. (By Mr. Johnson): Did you know George A. McDonald, the defendant in this case?

A. Yes, sir.

Q. How long have you known him? [12]

A. About six years.

The Court: Mr. Clasby, is that one of the issues, the ownership of the automobile, or is that admitted in the pleadings?

Mr. Clasby: I think it is admitted in the pleadings. My objection was probably a reflex.

The Court: Very well. In other words, can we proceed with the stipulation that the automobile involved at the time was owned by George A. McDonald?

Mr. Clasby: We may.

The Court: Very well.

Mr. Johnson: May we also stipulate that it was being driven by Mrs. George A. McDonald, the wife of the defendant, at the time of the accident?

Mr. Clasby: Yes, we may.

(Testimony of Earl G. Aronson.)

The Court: Very well.

Q. (By Mr. Johnson): After this accident happened, did you have occasion to speak with the defendant, George A. McDonald, concerning it?

A. Yes, sir.

Q. Will you tell the Court when those conversations took place, if you recall? First, did you have more than one conversation with him about it?

A. Yes, sir; we talked several times about it.

Q. Now, will you tell the Court when you had conversations with Mr. McDonald about it? [13]

A. I don't remember the dates, but it was shortly after the accident George told me that——

Mr. Clasby: I object.

Q. (By Mr. Johnson): Just tell as nearly as you can when these conversations took place. Do you remember when the first one took place?

A. I think it was about a week or two after the accident.

Q. And do you recall where that was?

A. Well, I know one was in the Northward Building.

Q. And where in the Northward Building?

A. In his apartment.

Q. Were you living in the Northward Building at the time also? A. Yes, sir.

Q. And Mr. McDonald was also living there; is that correct?

A. After the accident he moved into the Northward Building.

Q. Do you remember who was present at this

(Testimony of Earl G. Aronson.)

conversation that you had about a week or so after the accident in the Northward Building with the defendant, George A. McDonald?

A. His son was there, is the only one that I know of.

Q. And you recall the presence of no one else besides Mr. McDonald and yourself and his son; is that correct? A. That is correct.

Q. Will you relate to the Court as nearly as you can remember what was said by Mr. McDonald [14] concerning this accident, and what was said by you concerning it?

Mr. Clasby: To which we object, if the Court please, as being inadmissible. In the first place, it is hearsay; in the second place, we can see no basis for admissibility, it being no exception to the hearsay rule. In the third place, it is impossible to determine what conceivable materiality to the question before the Court, negligence, that there could be in the conversation between this man and Mr. McDonald some week or so after the accident happened. It can't be a statement against interest, as a part of the res gestae. Mr. McDonald was not driving. He was not at the scene of the accident. I am at a loss as to what is sought to be proved by the plaintiff in this conversation.

The Court: Objection overruled. He may answer.

Q. (By Mr. Johnson): Will you tell the Court, as nearly as you recall, what Mr. McDonald said about this accident and what you said, if anything?

(Testimony of Earl G. Aronson.)

A. I asked George why he let his wife drive the car if she didn't know how to drive.

Q. What, if anything, did he say?

Mr. Clasby: I object to that, if the Court please. I can't see how any answer to that question would be material.

The Court: Overruled. He may answer.

A. As we were talking, he said that his wife [15] didn't know how to shift gears from high range into low range. We talked about the shifting of the gears. I said, if she didn't know how to drive, why did he let her take the car out? He said he didn't think there was any harm in going to Anchorage, driving down the highway, all she thought about was putting it in gear and steering it down the road, and he said he didn't think about her hitting a rock and breaking the brakeline, hydraulic line.

Q. Did you have any other conversation with Mr. McDonald about this same subject after that, that you recall?

A. No, not on that subject. I talked to the boy about it.

Q. But you did not talk to Mr. McDonald?

A. No, sir.

Q. Did you have any information, or did you obtain any information before they left for Anchorage as to how long they intended to be gone or where they intended to go when they left Fairbanks? A. Yes.

(Testimony of Earl G. Aronson.)

Q. What, if any, information did you have on that subject?

A. My wife said—asked me if I would mind if she would go, if she could go. I said, "No, I don't mind if you go, but," I said, "I would rather if you don't wait," and she said, "Well, if we leave today we will be back Tuesday or Wednesday." She said, "We are just going to Anchorage and right back. We want to see some friends there." I don't know the lady's name. It is Poe somebody. That was the lady's first name. She worked there. [16] And she said, "We will go to Anchorage and come right back."

Mr. Johnson: Subject to the right to recall this witness later if it becomes necessary, we have no further questions at this time.

The Court: You mean recall him for the purpose of proving damages?

Mr. Johnson: Yes.

The Court: Very well. You may cross examine.

Mr. Clasby: I have, if it please the Court, no questions of this witness relating to the point at issue; however, I would like to get his present address and occupation and the address of the survivors, with the Court's permission, at this time.

The Court: You may question him about that.

Cross Examination

Q. (By Mr. Clasby): What is your address, Mr. Aronson?

A. 1653 - 252nd Street, Harbor City, California.

(Testimony of Earl G. Aronson.)

Q. Harbor City? A. Yes, sir.

Q. And where are you employed?

A. I am not.

Q. What is the address of Earlene A. Roberts?

A. Her address is 122 Mayes Street, Pryor, Oklahoma.

Q. And what is the address of Betty C. Howard?

A. Her address is Simi, California, Box 263.

Q. And what is the address of Earl, Junior?

A. His address is 1802 Lincoln Avenue, Dubuque, Iowa.

Q. In discussing this trip with your wife before she left, as I understand it, you had no idea that she was going anywhere except to the Anchorage area and back? A. That is correct.

Q. Do you know whether Mr. McDonald had any different idea of what their purpose was?

A. George told me that they were going to Anchorage and come right back.

Mr. Clasby: That is all.

(Witness excused.)

Mr. Johnson: If the Court please, in the absence of the deposition and the fact that our next witness, Mrs. Dickerson, will not be available until after lunch, I request now that we recess until two o'clock and that at that time we hope to go ahead with Mrs. Dickerson.

The Court: Does the defendant have any objection?

Mr. Clasby: No, she drove in, as I understand

it, from Anchorage throughout the night and went to get a little sleep this morning.

Mr. Johnson: Yes, she got in at 6:30 this morning.

The Court: Very well, this case will be continued until two o'clock.

(Thereupon, at 11:35 a.m., a recess was taken until 2:00 p.m.) [18]

Afternoon Session, 2:00 P.M.

The Court: Are the parties and counsel ready to proceed in Civil Cause 7728?

Mr. Johnson: The plaintiff is ready, your Honor.

Mr. Clasby: We are ready.

Mr. Johnson: The plaintiff desires to call Mrs. John Dickerson.

MRS. JOHN DICKERSON

a witness called by the plaintiff, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Johnson): Will you state your name, please? A. Mrs. John Dickerson.

Q. And where do you reside, Mrs. Dickerson?

A. In Palmer, Alaska.

Q. Did you formerly reside in Fairbanks?

A. Yes, sir, until September 1, 1955.

Q. Were you residing in Fairbanks during the summer of 1953? A. Yes, sir.

Q. Did you know Mrs. George A. McDonald that summer?

(Testimony of Mrs. John Dickerson.)

A. Yes, sir, from February, I believe, until July.

Q. And were you acquainted with Mrs. Earl Aronson? A. Yes, sir. [19]

Q. Were you also acquainted with Mrs. Andrew Hall? A. Yes, sir.

Q. And were you acquainted with George A. McDonald, Jr., the son of George A. McDonald?

A. Yes, sir.

Q. And you knew them all during the summer of 1953; is that correct?

A. That is right, yes, sir.

Q. During the summer of 1953, did you and the people I have just mentioned have occasion to take an automobile trip from Fairbanks?

A. Yes, we took a trip by car to Anchorage-Seward.

Q. And will you tell the Court who drove this automobile?

A. Except for about 90 miles, Mrs. McDonald drove the car the whole trip.

Q. About what time did you leave Fairbanks, if you recall?

A. We left on Monday morning about seven o'clock.

Q. And would that have been about the 28th of July, 1953?

A. It was the last week of July of 1953.

Q. Now, will you describe who was in the car and how they were seated when you left Fairbanks, if you recall?

A. I am not quite sure just how we were seated,

(Testimony of Mrs. John Dickerson.)

but I am sure Mrs. McDonald was driving. Mrs. Hall and I, I believe, were in the front seat, and [20] Bobby George and Mrs. Aronson in the back seat.

Q. That was when you left Fairbanks?

A. Yes, when we left Fairbanks.

Q. Where were you planning to go when you left Fairbanks?

A. When we left Fairbanks we planned to visit Anchorage and Seward.

Q. At that time, had anything been said by any of you about going to Valdez?

A. No, not that I recall. That part of the trip wasn't included in our plans when we left.

Q. Did you get to Anchorage?

A. Yes, we did, that night about seven.

Q. And from there you went to where?

A. We spent Monday night in Anchorage and went to Seward Tuesday morning and returned Tuesday afternoon.

Q. Then, where did you go?

A. We spent Tuesday night at Anchorage again and shopped some Wednesday morning and left there after lunch Wednesday, to come back to Fairbanks I supposed.

Q. That would be about the 30th of July; is that correct?

A. I am not sure just exactly the date. It was the last Wednesday in July.

Q. And it was the date of the accident?

(Testimony of Mrs. John Dickerson.)

A. Yes, sir. Well, the accident occurred about 2:30 Thursday morning. [21]

Q. Oh, I see. Anyway, this was just the day before? A. Yes, the last day.

Q. When did you first hear any discussion about going to Valdez instead of directly to Fairbanks?

A. Between Anchorage and Palmer we discussed going to Valdez and dropped in for a visit with the Baptist Minister in Palmer and we discussed it at his home there.

Q. Was Mrs. McDonald there?

A. Mrs. McDonald and I were the only two that went to visit with Mrs. and Reverend Richey.

Q. What, if anything, was said by Mrs. McDonald or Reverend Richey or you regarding this proposed side trip to Valdez?

A. We were thinking, at least Mrs. McDonald and Mrs. Hall were interested in going to Valdez and when Mrs. McDonald and I went in to see Mr. Richey some remark was made and he said that he wouldn't advise going since they were working on the road, it was under construction. They had been there just the past Sunday and it wasn't very travelable.

Q. And he advised against going down there?

A. Mrs. Richey, in particular, said she wouldn't advise a trip to Valdez.

Q. After that visit, did you proceed on toward, well, the direction of Fairbanks?

A. Yes, we left Palmer and came up the [22] highway, the Glenn Highway.

(Testimony of Mrs. John Dickerson.)

Q. The Glenn Highway? A. Yes.

Q. How were you seated in the car at that time, do you recall?

A. No, I don't recall how we were seated. We changed seating at Meekins. I believe we stopped there. We stopped there for sandwiches and cokes and we changed seating to Mrs. Aronson and me in the back and Mrs. McDonald driving, Mrs. Hall in the center, and Bobby George, Junior, on the right front.

Q. And there were three in the front seat after you left this eating place? A. Yes.

Q. And you and Mrs. Aronson in the back?

A. Yes, sir.

Q. What side were you sitting on?

A. I was behind the driver on the left.

Q. When you reached the junction of the Glenn-Allen Highway and the Richardson Highway, were you still seated in that position, that is, all of the people in the car?

A. Yes, sir, we were still seated that way.

Q. Did you stop at that intersection?

A. Not to a standstill. We had discussed just before the turnoff whether or not we wanted to go to Valdez and Mrs. Aronson said: no, Mr. Aronson had recently lost his father and she would like to go back to Fairbanks. I said I was homesick and [23] wanted to see my two children and I wanted to come back; then each one stated his desire, and the other three wanted to go to Valdez, so there was no stopping there at the Valdez junction. Mrs.

(Testimony of Mrs. John Dickerson.)

McDonald there turned to the right and we started toward Valdez.

Q. That was by reason of the fact that a majority in the car had voted to do that, so to speak?

A. Yes.

Q. Now, will you describe, after you turned to the right, or I suppose it would have been to the right and south—at this junction you proceeded on toward Valdez on the Richardson Highway; is that correct? A. Yes, sir.

Q. Had any one of you ever been over that road before?

A. No, we hadn't but we didn't realize that until a little while later.

Q. And none of you knew anything about the road at all, in other words, from personal knowledge? A. No, sir.

Q. After you turned toward Valdez, will you describe to the Court generally what happened or what took place?

A. Well, as the Minister in Palmer had told us, the road was under construction. The righthand side of the road was dug up. The lefthand side was fairly passable; you could travel it fairly easily; and we traveled, of course, on the good side of [24] the road until we met a pickup truck at about Mile 42. Mrs. McDonald turned right on the travelable part of the road to let the car pass and she hit a large rock boulder. It made quite a noise under the front end of the car and we smelled this peculiar odor and so Bobby George, Junior, got out and came back.

(Testimony of Mrs. John Dickerson.)

Q. Did you stop then?

A. We were stopped on top of the boulder. The car couldn't pass over the boulder; in fact, I don't know how we got over. I believe she did eventually "skrug" over the boulder but the brake fluid had all run down. At that time she had no floor brake at all.

Q. You knew the foot brake was out of working order?

A. Yes, we knew we had no floor brake at the time we hit the boulder; however, the man in the pickup did tell us if we would go to about Mile 57 there was a place that might be able to fix the brake.

Q. Was that ahead of you?

A. Yes, sir; that was approximately fifteen or so miles.

Q. Beyond where you were?

A. Beyond where we were, yes, sir.

Q. Did you proceed on toward this point?

A. After a few minutes' hesitation, we did.

Q. Was there any discussion at that point about going ahead?

A. Not from the whole group. Mrs. McDonald [25] and I were out of the car to ask the driver of the pickup and she debated somewhat to herself about going on but there was no further discussion; however, it was clear that the two of us did not want to go, Mrs. Aronson nor I.

Q. But the other three did indicate that they wanted to go?

(Testimony of Mrs. John Dickerson.)

A. Not at that particular point, it wasn't discussed, but it had already been decided and we all knew how each one felt, but it wasn't discussed at that point.

Q. Will you tell the Court what happened after that, if anything? You continued on for about fifteen miles?

A. We went on to the place at about Mile 57 and the manager, we supposed, came to the car after Mrs. McDonald stopped.

Q. What sort of a place was this gas station or whatever it was?

A. There was a gas tank. There was gas available, and I understand that there is an eating place inside.

Q. Was it a roadhouse, did you know? Did they have sleeping facilities, too?

A. I am not quite sure, but I think they did. I wasn't familiar with it and I still am not. We went over the road once and I can't place the place now, but I know they had gas and eats and I believe that it did have a sleeping place.

Q. Would you and Mrs. Aronson have been able to take accommodations there? [26]

A. I would not have and I don't know Mrs. Aronson's financial condition, but I could not have taken a place. I was a guest on the trip.

Q. Was Mrs. Aronson a guest also?

A. Yes, sir.

Q. What, if anything, did this man say to you or to Mrs. McDonald, if you recall?

(Testimony of Mrs. John Dickerson.)

A. Yes. Mrs. McDonald asked him if he could fix the brakeline, and he said no, he didn't do mechanical work but that she had come over the worst of the road and why didn't she go over to Valdez using the emergency, so we did, or Mrs. McDonald took his advice.

Q. And you went on?

A. And she went on.

Q. Incidentally, about what time of day was it, or evening?

A. It was about 8:30 in the evening, 8:30 p.m., when we hit the boulder, and when we reached the stop at about Mile 57 it must have been 9:30 or more, for our traveling was slow from the time we lost the brakes until we got there.

Q. That would have been in the evening; is that correct? A. Yes, sir.

Q. Was it light or dark or was it getting dark?

A. It was getting dusky dark. [27]

Q. Do you recall the condition of the weather?

A. It had been clear on the trip that day. The weather was good but it was beginning to get a little cloudy overhead in the evening.

Q. Was there anything else that might have impaired the vision?

A. Not that particular time of the journey, but later on at the time of the accident the fog was thick, very thick.

Q. Will you tell what happened after you left this roadhouse, gas station, or whatever it was?

(Testimony of Mrs. John Dickerson.)

A. We took a detour part of the way after we left this Mile 57.

Q. Was that due to the construction of the road?

A. Yes, sir. I am not familiar now with the detour but it took us through the woods quite a bit and my recollection was of wild forest, animals, and I was a little bit afraid as to what might happen to us if the car would stop, but she went on until we started up this mountain, and it seemed a long way up to me, and just as we got to the top or near the top I was unable to see the lights shining to hit the road even through the fog enough to see where we were going. Of course, I was in the back seat, but Mrs. McDonald had trouble, so I asked if we could stop. My intentions were to stop until the fog lifted, and it seemed to be agreeable with everyone to stop. Then after we had, and being a minister's wife and familiar with [28] what prayer could do, I asked if we could have prayer, ask God to help us, so we did, and each one led that prayer.

After we waited just a few moments, Mrs. McDonald thought she could see clearer, so she decided she would go on, and it was just a short time then until we reached the top of the mountain. You could tell when you reached it. It was just a few minutes.

Q. Will you tell what, if anything, you saw Mrs. McDonald do with respect to driving the car or what——

(Testimony of Mrs. John Dickerson.)

A. As we have discussed already, or as I have told you, she was using the emergency for all stopping and slowing down, and when we went over the top I was leaning up close behind her, because I was apprehensive and I noticed we went over the top of this mountain at about 20 miles an hour, and as she started down the other side the car was rolling at faster than twenty. It picked up speed and she reached for the hand brake and pulled it up about half way to slow the car down, and when she started up with the hand brake I smelled it burning and so did everybody else, and she kept putting the brake all the way up to stop it and it didn't even check the speed at all, the burning was worse and worse, and when she realized she wouldn't be able to stop with the hand brake she tried to get the gear—it was an automatic shift—she was trying to get into a gear. Sometime from the time she went over the top until she tried again the gear had gotten into neutral and she couldn't—the car was going maybe [29] forty-five miles—I would estimate about forty-five miles when she started trying to get the car in low or mountain—one of the gears. She couldn't get the gear in, so she wrestled with that, but she never was able to get it from neutral into gear, so we free-wheeled.

Q. On down the line?

A. On down the line.

Q. Did the hand brake hold at all?

(Testimony of Mrs. John Dickerson.)

A. Not at all, no sir. At least, the police reported later that it did not.

Q. You have no particular recollection of what happened after you ran off the road?

A. Yes, I remember it seemed like a long, long time going down the mountain, and finally we came down out of the fog, but the car was going at such a rate of speed that I couldn't see anything but swishes that went by the window, and the last thing I remember, the car, she tried to make the curve—you could tell she was trying to make a curve and the car hit on the right side and I heard Bobby George scream, and we were told it caught his arm then, and I don't remember anything, after the car hit on the side, it slid for a little ways down the road until of course——

Q. You were rendered unconscious in this particular collision or crash, were you?

A. Yes. I don't remember anything after the [30] car slid until I regained consciousness afterwards.

Q. Were you in the hospital then?

A. No, we were all thrown clear of the car before it hit a big boulder beside the road and bounced back down, and when I regained consciousness I was sort of crawling up the side of the mountain toward the highway, back up toward the highway.

Q. Did you see anyone else?

A. Yes. I heard Bobby George crying. I reached back with this hand to see where he was, and he

(Testimony of Mrs. John Dickerson.)

was just at the end of my hand. I could feel him and he would call and then I would call him and he would answer maybe once and the next time he wouldn't, so I knew he was drifting back and forth from consciousness to unconsciousness. Although my back was somewhat injured, I crawled to the top of the cliff and looked up the road and right at the curve she was trying to make I saw Mrs. McDonald and Mrs. Hall and I could tell that Mrs. Hall's head was off and that Mrs. McDonald wasn't living. I am a nurse. I was going up to help them, but I knew it was no use.

Q. All of the time that you were traveling toward Valdez was there much traffic coming from the opposite direction, do you recall?

A. No. We had quite a number of cars at 42 Mile—quite a number of cars passed by when we were stopped there, but after that we saw just a little traffic, just the Road Commission tractors, that I remember. [31]

Q. I believe you stated when you stopped just before going over Thompson Pass — incidentally, you have learned since that this divide you were crossing was Thompson Pass; is that correct?

A. Yes. I didn't know at the time where we were.

Q. But it was a long mountain road, as you have described it?

A. Yes, and of course I have to take the Territorial Police's word for it afterwards that we went approximately 3½ miles down a 45-degree decline.

(Testimony of Mrs. John Dickerson.)

Q. At this point where you stopped just before you went over the Pass, was there anything to prevent your staying there for a while? Were you in such a position that you could have stayed there? You indicated in your testimony that you wanted to stay there. Was there anything to prevent that, that you could see?

A. I am not quite sure. I believe that it was Mrs. McDonald's opinion that we were blocking the road in the particular way we were parked and we weren't sure whether there would be trucks coming or going, so she decided to go on.

Q. Did you have your lights on?

A. We had lights on but they weren't very penetrating through the fog.

Q. Did any truck or tractor come while you were stopped? A. No, sir. [32]

Q. Do you recall passing any truck or tractor or automobile or vehicle after you proceeded over the Pass and down?

A. No, we didn't. The next car I saw was when I crawled up the side of the mountain and got to the road. As I was crawling I saw some lights coming way down the road. It was my idea, in that particular condition, that I must get up there and flag them down and let them know there was a wreck. That was what I was trying to do, and there were three service men; one stayed and two went back to Valdez and called emergency help, and then a bus in the meantime came by going to Valdez, which picked up Bobby George and me.

(Testimony of Mrs. John Dickerson.)

Q. And took you into town?

A. And took us into Valdez. I couldn't find Mrs. Aronson, though, when I was looking, and didn't know until after I was in the hospital an hour or so that she was still up at the wreckage pinned under the car.

Q. I believe it is your testimony, is it not, that so far as you and Mrs. Aronson were concerned you did not desire to go to Valdez and did not actually consent to it?

A. That is my testimony.

Mr. Johnson: You may cross examine.

Cross Examination

Q. (By Mr. Clasby): Mrs. Dickerson, as I understand it, you wanted to come home to Fairbanks in preference to taking the side trip to Valdez? A. Yes, sir. [33]

Q. But after having had the discussion several miles before reaching the intersection of the Glennallen and the Richardson Highway and after learning that the choice of the other three was to go to Valdez, you made no further remonstrance?

A. No, I didn't make any further remarks as to my disagreement.

Q. And as to Mrs. Aronson, do you recall her making any further remark?

A. Not an opposing statement as such.

Q. Then, on your direct testimony, you spoke again about you and Mrs. Aronson's attitude toward proceeding to Valdez after the brakes had

(Testimony of Mrs. John Dickerson.)

been lost on the car, and I didn't get that too clearly. Did you mean that your attitude then was the same as it had been prior to coming to the intersection, or did you form a new concept?

A. No, it was the same. We were agreed that we didn't want to go, but we didn't make any other opposing remarks after the majority decided to go, but we just had a fellowship of disagreement somewhat, so we stayed together in the back seat the rest of the trip.

Q. But that had nothing to do with the vehicle itself being driven after the brakes had failed? [34]

A. Our feeling about it had nothing to do with it. I would say no.

Q. Because had the car been turned around and driven towards Fairbanks it would have been no different than in going on towards Valdez?

A. I wouldn't have agreed to going any further back than Glennallen Garage. That was my personal feeling, that that was the wise thing to do, but being a guest on the trip I didn't express it.

Q. Did you express that?

A. No, I didn't. As I say, as a guest I expressed my opinion one time and I didn't continue to, but my opinion and my desire was to go back to Glennallen Garage, which was only 42 miles.

Q. I believe that there was another place even closer than that on the back of the trail. Do you recall that?

A. I was very unfamiliar with the Territory

(Testimony of Mrs. John Dickerson.)

and so was Mrs. Aronson and all the occupants of the car.

Mr. Clasby: Would the Court excuse me a minute?

The Court: Certainly.

Q. (By Mr. Clasby): I think I have the name correctly, but it is a rather strange one, Tazlina Lodge and Tazlina River, do you recall passing that at about Mile Post 79 or 80 from Valdez?

A. No, I don't. I don't know just the course [35] of that detour at that particular time and I don't know whether we were on the detour at that time, but I don't remember passing it.

Q. It would be, I suspect, the only reasonably large bridge that you would have crossed after having left the Glennallen junction prior to the accident. A. I just don't recall that.

Q. You didn't stop there on the way down?

A. No, we didn't.

Q. So you have no knowledge of the accommodations? A. No, sir.

Q. Did you people have a "Mile Post" with you on the trip?

A. I don't remember having a "Mile Post."

Q. Or a map of the highway showing the places along the highway?

A. I don't recall. The driver might have had, but I don't remember it.

Q. Then, when it was proposed that the vehicle be driven after the brake fluid had drained out and

(Testimony of Mrs. John Dickerson.)

there were no brakes on the car, did you voice any objection to the car being driven?

A. No, I didn't.

Q. Did Mrs. Aronson, in your hearing?

A. No. We both realized we would have to get it fixed if we were going to get back home, but it was my thought that we probably would go to Mile Post 57, since that was recommended to us by the man in the pickup. [36]

Q. Was there any discussion, as you recall, between the people in the car relating to the danger of operating it without brakes?

A. No. I was well aware of the danger to some extent, but there was very little I really could do about it.

Q. Do you recall the mile from Valdez that is the summit of Thompson Pass?

A. My understanding was that it was 21 miles on this side of Valdez that the wreck occurred. I don't remember the mileage.

Q. That would, then, make Thompson Pass about 24 miles north of Valdez; is that right?

A. Roughly calculating, yes, sir.

Q. Had there been any mention of any specific reason for wanting to go to Valdez?

A. Yes, there had been. It was to prolong the trip, in behalf of Mrs. Hall.

Q. Sightseeing, or was there a church affair in Valdez? A. It was sightseeing.

Q. Wasn't a church affair going on at Valdez that you know of? A. No, sir.

(Testimony of Mrs. John Dickerson.)

Q. You mentioned that when you stopped at Mile Post 56 that you didn't feel, as a guest, that you were in a position to get out of the vehicle, [37] and stay there. I couldn't quite grasp your meaning. Was it because you didn't have the money to pay for accommodations?

A. Yes. I wasn't financially able, myself. I couldn't speak for anyone else.

Q. Were you merely embarrassed about asking for a loan or wasn't it possible to get a loan from anyone else?

A. I was embarrassed. I don't know the financial situation of anyone else in the car.

Q. Did it impress you that it would have been a sensible thing to do, however?

A. Had I had any idea of the consequences of the trip, I suppose I would have taken the chances of being eaten by wild animals rather than——

Q. It did occur to you when you were at 56 Mile that it would be sensible for you to get out there and stay?

A. We were aware of the danger, but I did not entertain the idea of leaving the party. I was with them, I had been invited, and I didn't particularly entertain the thought at all of leaving the party. At this point Mrs. Aronson and I asked Mrs. McDonald to let's stop and have pie because we had heard they served good pie there, and she didn't care for pie so we went on.

Q. Do I understand that throughout this trip you were the guest of Mrs.—all the people in the

(Testimony of Mrs. John Dickerson.)

car were the guests of Mrs. McDonald to the extent [38] that Mrs. McDonald paid for the hotel and other accommodations, the gas, oil and meals, and so on?

A. It was my understanding that we were guests of Mrs. McDonald and Mrs. Hall combined, for they had planned the trip already.

Q. And those two ladies took care of the expenses?

A. They did of mine, except for several meals Mrs. Aronson insisted on paying my ticket herself, but other than those meals Mrs. Hall and Mrs. McDonald financed the trip, so far as I know.

Q. Do you believe from your experience that on this trip Mrs. McDonald was a reasonably careful and cautious driver?

A. Well, I hesitate to mention it, but no, I had not felt too safe from the first day, because she did take her half of the middle of the road even on the mountains around Anchorage and I was already tense.

Q. In any other respect, did she evidence carelessness?

A. On the trip to Anchorage we almost collided head on around a curve with a car.

Q. How about from the time that the brake fluid was lost on the south?

A. I felt that she was fairly careful, as careful as you could be under the circumstances with her actual handling of the material she had available there.

(Testimony of Mrs. John Dickerson.)

Q. I have no other questions. Just a moment. By the way, about how long were you parked [39] up on or near the summit of Thompson Pass?

A. I would estimate less than ten minutes. As far as I can recall, it was only a short while.

Q. You mentioned a prayer that each led. Do you mean to themselves, or outloud?

A. No, we prayed audibly, each one. Each one led a short prayer audibly.

Q. Audibly? A. Yes.

Q. Was that just after the decision to go ahead on the mountain?

A. Well, we didn't stop there to discuss whether or not we were going over. The fog was the thing that caused me to ask her to stop. The fog was so thick.

Q. What I mean, however, did you say the prayer after having decided to go forward down the mountain?

A. I am not quite clear about the question. The decision to go, I suppose, was made finally at Mile 57 to go to Valdez.

Q. I am trying just to clear up in my mind some of the time sequences in your direct testimony, Mrs. Dickerson. As I recall it, you mentioned that you stopped at this location very near the summit—Mrs. McDonald did at your request—and that the fog was rather heavy, and after being there for about ten minutes or so Mrs. McDonald [40] thought she could see ahead and it was clear-

(Testimony of Mrs. John Dickerson.)

ing enough so she thought she could go ahead. Also a prayer was said.

What I would like to know: did you say the prayer just after stopping, some ten minutes later talk about going ahead, and finally going ahead, or did you say the prayer after you had decided that it was clear enough to proceed and start to go down the mountain?

A. We stopped, and when we stopped I suggested we have prayer about the remainder of the trip and, after we had closed the prayer, which took a very few minutes—Mrs. McDonald was very tired, you could tell, and so were all the rest of us, and we relaxed and hardly anything was said. After a few minutes Mrs. McDonald said, "I believe the fog has lifted and we will try it a little while further," because we didn't know whether we were right at the top or how much further we had to go.

Q. And it was then only a short bit later that you realized you were at the top?

A. Yes, I would say about ten minutes from the time we started until we got off. I don't recall the time, but it was a short while before we realized we were at the top.

Q. And had started down the other side?

Q. And had started down the other side, yes, sir.

Q. There was then no stop at what you would call the actual summit?

A. I wondered after going over the road since [41] then once if we weren't actually at the wind-

(Testimony of Mrs. John Dickerson.)

ing part of the road at the summit where we stopped because it was such a short time before we realized we were heading slightly over and down.

Q. At the time you people did stop, you didn't realize you were at the summit?

A. No, we didn't.

Q. Then, when Mrs. McDonald said, "Well, it is clearing a little; I think we can go ahead," did you or anyone else in the car at that time object to going ahead?

A. No, we didn't object at that time.

Q. Specifically with relation to Mrs. Aronson, you did not hear her object to going ahead?

A. No. As I said before, as far as we could tell, we had the road blocked because we stopped right on the tracks. The fog was so thick that you were afraid to turn to either side.

Q. It had begun to clear, as I understand it?

A. Mrs. McDonald thought it had cleared.

Q. So she could tell where she was in the road?

A. She felt she could. I didn't see any change myself.

Q. But you don't recall hearing Mrs. Aronson object to the party continuing at that point, then?

A. No, we didn't verbally object.

Q. As I recall your testimony, when Mrs. McDonald started driving that she was keeping it at around twenty miles an hour?

A. She had tried to maintain that speed after [42] we had the trouble earlier at Mile 42.

(Testimony of Mrs. John Dickerson.)

Q. And it was not until you were picking up speed because of the downgrade that the speed increased over the twenty miles an hour?

A. When we started down the other side, of course, the speed increased.

Q. I direct your attention to the country after the brake fluid had been lost. Was there some rolling country in there?

A. Yes, there had been some rolling country. To my recollection, though, it was not until the latter part that we got into too many hills and mountains.

Q. Had you observed any occasions in this rolling country where Mrs. McDonald would control the speed of the car on the slight downgrade by using the hand brake to keep it within the 20 miles an hour range?

A. Yes, that was her only means of keeping the car in control, or at least braked. That was her only method of braking.

Q. Had you observed her do that several times?

A. Yes, sir.

Q. And it worked efficiently?

A. Yes, it worked.

Q. But on the Valdez side of the summit the hand brake just was not able to control the car; is that right?

A. When she started pulling it up the burning [43] odor occurred and, of course, the harder she pulled the more it burned, so finally the car was rolling at such a speed she realized the hand brake

(Testimony of Mrs. John Dickerson.)

was gone, so she focussed her attention on this gear, trying to get it into mountain gear, the mountain gear of a Dodge 1953.

Q. 1953 Dodge? A. Yes, sir.

Q. Are you familiar with a 1953 Dodge? Have you driven them?

A. Not at that time. I was absolutely unfamiliar with the automatic shift. We had used conventional shift altogether in our family car.

Q. To sum up your testimony, then, as I understand it, at no time, neither you nor Mrs. Aronson objected to the car going on because the brakes were defective?

A. We did not verbally object after we had stated our desire earlier but everyone in the car was well aware of it, I am sure.

Q. Now I have just a little different thing in my mind. I understand you and Mrs. Aronson wished to go to Fairbanks rather than Valdez.

Now I would like to know, just to sum up, neither you nor Mrs. Aronson made any objection to the automobile being driven without brakes?

A. As I recall it, no verbal—we didn't speak our objection. [44]

Q. You may have had mental reservations?

A. We had many desires not to go. My reason was that I was a guest and it wasn't really my decision to make, since I was not financing the trip and it wasn't my car; I wasn't the driver, and so to be socially polite I felt at that time I would let the one make the decision who was doing those

(Testimony of Mrs. John Dickerson.)

things, and I feel sure Mrs. Aronson felt the same way.

Q. But you did that with an awareness of the danger and peril of going forward?

A. I did, personally, I did.

Mr. Clasby: I have no other questions.

Redirect Examination

Q. (By Mr. Johnson): Now, you have said that you made no verbal objection. By the same token you made no verbal consent?

A. No, I didn't, absolutely didn't consent to going on.

Q. And do you believe that if Mrs. McDonald had been a competent driver that she would have been able to put the car in low gear at the top of the hill and used the compression as a brake?

A. Yes, we have learned since that had she known how to accelerate the motor to speed of the wheel, she could have put it in mountain gear.

Q. And she had plenty of opportunity to do [45] that even at the time you were stopped?

Mr. Clasby: We object, if the Court please, to the form of the question. This is counsel's witness; not mine.

The Court: Sustained.

Q. (By Mr. Johnson): Do you believe from what you have stated that Mrs. McDonald had ample opportunity to put the car in low gear as she started to move away from this point of, well, the prayer?

(Testimony of Mrs. John Dickerson.)

A. Yes, she did. I want it clear——

Mr. Clasby: Just a moment. The question is answered and I think she shouldn't go any further with it.

The Witness: May I say from the very peak of the summit?

Mr. Clasby: Just a moment. This may be quite material, and I would prefer that your testimony be in response to a question by counsel.

Q. (By Mr. Johnson): Will you explain what you have in mind or what you thought at the time?

Mr. Clasby: Just a moment. I don't like the witness turned loose. I want to be able to object if it should be irrelevant or immaterial.

The Court: Yes. I think the question should be more definite. I was going to suggest that we go back and read the question and answer and see if she had completed it.

(Thereupon the question and answer were read by the reporter.) [46]

Mr. Johnson: Did you fully answer the question?

The Witness: No, sir. I wanted to explain.

Mr. Clasby: Just a minute. How else can the question be answered except yes or no, and the witness has answered "Yes."

The Court: I think it is true. He may put another question. She has answered the question, "Yes." Do you wish to qualify your answer?

The Witness: No, there was no qualification. It was an explanation. Yes, from the time of the

(Testimony of Mrs. John Dickerson.)

prayer she could have, had she known how, she could have from the summit to the time that the brake burned out.

Mr. Clasby: Just a moment. Now we are getting into a realm of speculation and guessing. I concede that the witness is correct, that a person with a vehicle standing still has an ample opportunity to put it in low gear. She was at the summit and she didn't know she was at the summit.

The Witness: That was what I wanted to make clear.

Mr. Clasby: Beyond the summit, we are getting into speculation.

The Court: I think that is true, but you may proceed by question, answer, and objection.

Q. (By Mr. Johnson): After you reached the summit, what, if anything, could Mrs. McDonald have done at that time with reference to putting [47] the car in low gear, if you know?

Mr. Clasby: To which we object, if the Court please. It has not been shown that this woman had the knowledge from which to make such a guess.

The Court: I thought that was true, Mr. Clasby, but she has been permitted to answer a number of such questions without objection. She said she has had no experience with that type of gearshift.

Mr. Clasby: She said at that time, but she had subsequently learned, but we permitted her to answer questions so the Court and counsel could understand the kind of gearshift employed. We can form our own conception from those answers. Now

(Testimony of Mrs. John Dickerson.)

she is being asked to testify as an expert as to what this woman could have done.

The Court: I sustain the objection.

Q. (By Mr. Johnson): What, if anything, did she do with reference to putting the car into low gear as you went over the Pass?

A. At the very time we reached the summit she was in a gear, because she drove over in a gear, but from the time we were at the summit until the brake was gone she had somehow gotten the gearshift in neutral on the car, and when she reached for the brake, when she pulled the brake all the way up, at that particular time the car was in neutral, because I was watching over her shoulder, as I said before, and it is clearly [48] labeled "neutral, mountain gear" on that gearshift, but after the brake had gone the speed was such that she could not get it from neutral into gear. She tried hard, almost half the way down, to do that, but she wasn't able to, so after a while she cut off the switch and just made no other attempt except to hold the car in the road.

Mr. Johnson: I think that is all.

Mr. Clasby: We have no other questions.

Mr. Johnson: Thank you, Mrs. Dickerson, unless the Court has some questions.

The Court: No, that is all, thank you.

(Witness excused.)

The Court: We will take a ten-minute recess.

Clerk of Court: Court is recessed for ten minutes.

(A ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

Mr. Johnson: If the Court please, due to the fact that I have not had an opportunity to read the deposition which was taken in Beaumont, Texas, and therefore am uncertain as to whether or not I might want to introduce it myself, I am reluctant to rest at this time until I have an opportunity to read it.

The Court: It has arrived, has it?

Mr. Johnson: Yes. It is in the file, if the Court please. It arrived at the Clerk's Office this noon.

The Court: How lengthy is it? [49]

Clerk of Court: 131 pages, your Honor.

Mr. Johnson: And unless it is not agreeable, I would suggest that we recess until ten o'clock tomorrow morning, or earlier if the Court so desires, and then I would have an opportunity to know whether or not I might want to introduce it.

The Court: Does the defendant have any objection to the motion of the plaintiff?

Mr. Clasby: No, I have no objection to him having time to look the deposition over and decide whether he wants to introduce it as a part of his case.

The Court: Very well, the hearing of this cause will be adjourned until ten o'clock tomorrow morning.

Mr. Johnson: Thank you very much, your Honor. May I have leave to withdraw the deposition and take it to my office?

The Court: Do you have a copy of it, Mr. Clasby?

Mr. Clasby: I was supposed to have one but it hasn't arrived yet.

The Court: I am wondering, you will want to examine it, too, I presume.

Mr. Clasby: I got it out of the Clerk's Office and spent my noon hour looking at it. I have gone over about two-thirds of it. If I get my copy, I will let Mr. Johnson know; otherwise, if I could have it about 8:30 in the morning it would probably work out all right with me.

Mr. Johnson: Yes, I will be through with it.

The Court: That is fine and I will permit Mr. Johnson to withdraw it.

(Thereupon, at 3:10 p.m., October 8, 1956, an adjournment in this cause was taken until 10:00 a.m., October 9, 1956.)

Fairbanks, Alaska, October 9, 1956

Be It Remembered, that the trial of Cause No. 7728 was resumed at 10 a.m., October 9, 1956, plaintiff and defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding.

Clerk of Court: Court is now in session.

The Court: Are counsel ready to proceed in Civil Cause 7728?

Mr. Johnson: The plaintiff is ready, your Honor.

Mr. Clasby: The defendants are ready.

The Court: Very well, you may proceed.

Mr. Johnson: If the Court please, the plaintiff feels that the deposition of the defendant's witness,

George A. McDonald, Jr., would be of material help to the Court and for that reason we request that it be read at this time.

The Court: Are there any objections?

Mr. Clasby: I understand that counsel has that privilege under the Federal Rules; however, he makes the witness his witness when he does so.

The Court: And I understand that the offer is [51] in toto; you are offering the entire deposition?

Mr. Johnson: Oh, yes.

The Court: Very well.

Mr. Johnson: Do you want me to read the whole deposition?

Mr. Clasby: Yes. He is your witness, and I have a right to object anywhere along the line.

(Thereupon the deposition of George A. McDonald, Jr., was read into the record by plaintiff's counsel, with the following interpolations during the reading:)

Pages 4 to line 20 on page 17:

"Deposition and answers of George A. McDonald, Jr., witness for defendant, who resides in Jefferson County, Texas, taken on the 4th day of October, A.D. 1956, before me, Odessa J. Smith, Court Reporter and/or Notary Public in and for the County of Jefferson, in the State of Texas, at the law offices of Strong, Moore, Pipkin, Strong & Nelson, at Beaumont, Texas, between the hours of 10:00 o'clock a.m. and 1:30 o'clock p.m. of said day, in accordance with the accompanying agreement of counsel. And the said George A. McDonald, Jr., the witness named in said agreement hereto annexed, personally appeared before me to depose

in said suit pending in the District Court of the District of Alaska, Fourth Division, wherein Earl G. Aronson is plaintiff, and George A. McDonald is defendant; and that I was then and there attended by Howell Cobb, Esq., counsel for plaintiff, and Chas. S. Pipkin, Esq., counsel for defendant; the said George A. McDonald, Jr., being by me first carefully examined, cautioned and sworn to tell the truth, the whole truth and nothing but the truth, touching his knowledge of the matters and things in controversy in said cause, deposes and says as follows, to-wit:

Mr. Pipkin: Now I believe we have a stipulation here to the effect that this deposition may be taken on oral deposition.

Mr. Howell Cobb: Why don't you attach that stipulation or have her make a copy of it?

Mr. Pipkin: Let's let it go back with the deposition. I would like to have the further stipulation that we waive the reading of the deposition and signing by the witness. We are willing to do that since he is our witness, for the purpose of this deposition. Are you agreeable to waiving the signature?

Mr. Cobb: Yes. I don't see how we can do otherwise since it is set next Monday, and of course I don't know whether all of the matters are contained in this stipulation but plaintiff would reserve the right to make all objections other than signature and formalities until the time of trial.

Mr. Pipkin: Let's modify that, except as to leading questions on my part. I would like to, as

to the form of my question to which you think it is leading, you tell me so I may reframe the question, and all other objections be made at the time of trial.

Mr. Cobb: All right, because I don't know whether the rules of evidence are the same in Alaska, I presume so, so I will object to all leading questions, I won't object to all but I will suggest the objection will be made now rather than at the time the deposition is introduced. Actually I don't think that's important, Mr. Pipkin, because this is a trial before the Court, but I will make those objections at this time. Please enter our appearance for the plaintiff, Miss Odessa.

Mr. Pipkin: I understand from the statement in the letter to me that the practice there in Alaska —in this Court in Alaska is governed by the Federal Rules of Civil Procedure in the District Courts of the United States.

GEORGE A. McDONALD, JR.

having been first duly sworn, testified as follows, to-wit:

Direct Examination

Q. (By Mr. Pipkin): I will ask you your name.

A. George A. McDonald, Jr.

Q. George A. McDonald, Jr.? A. Yes, sir.

Q. Mr. McDonald, you speak out distinctly because the nodding of the head or shaking of the head or whatever you do, she can't get that down on paper, so you will have to speak out and not make signs. Now you understand what we are do-

(Deposition of George A. McDonald, Jr.)

ing here, we are taking what is known as your oral deposition, which means that you are now placed under oath which has been administered by the Notary Public, and you understand, do you not, that you are testifying now under oath the same as if you were in Court?

A. Yes, sir, I do.

Q. Have you ever been in Court?

A. No, sir, I haven't.

Q. How old are you? A. Eighteen, sir.

Q. When was your eighteenth birthday?

A. March 16th.

Q. Where do you live now?

A. I am living at 695 Anchor Street, here in Beaumont.

Q. Is that in Jefferson County, Texas?

A. Yes, sir, Jefferson County, Texas.

Q. With whom do you live there?

A. With my aunt, Katy Smith.

Q. How long have you been there?

A. Since 1953.

Q. You have been living there since 1953?

A. Yes, sir.

Q. When were you last in Alaska?

A. Let's see, I believe it was September of 1953.

Q. Where does your father and mother live—pardon me, your mother is deceased?

A. Yes, sir. My daddy is married again.

Q. And where does he live?

A. He is living at 1195 Washington Boulevard.

Q. What city, town and state?

(Deposition of George A. McDonald, Jr.)

A. Beaumont, Texas, in Jefferson County.

Q. Do you expect to be in Alaska at any time soon? A. No, sir, I don't.

Q. You do not expect to be there, or do you, during the month of October, 1956?

A. No, sir, I don't.

Q. Are you presently, or not presently, in the military service?

A. I am in the military, in the Air Force.

Q. You are now—what is your—are you stationed in Beaumont?

A. No, sir, I am stationed in Loring Air Force Base, Limestone, Maine.

Q. Limestone, Maine, what is the occasion for your being in Beaumont at this time?

A. I am on leave.

Q. And how long have you been here this time?

A. I have been here since the 28th of September, 1956.

Q. Where were you previously stationed?

A. Amarillo Air Force Base, Amarillo, Texas.

Q. When are you destined to report, ordered to report in Maine?

A. The 22nd of October of 1956.

Q. Uh, huh. Now the defendant in this case, Mr. George A. McDonald, is your father?

A. Yes, sir.

Q. Where were you living during the year 1953, where did you reside?

A. We were living in Fairbanks, Alaska.

Q. With whom were you residing there?

A. I was living with my mother and dad.

(Deposition of George A. McDonald, Jr.)

Q. And what was your mother's first name?

A. Naomi—N-a-o-m-i.

Q. Mrs. Naomi McDonald? A. Yes, sir.

Q. Was your father working at Fairbanks, Alaska, at that time?

A. Yes, sir, he was working.

Q. What kind of business was he in?

A. He was in the used car business.

Q. You were how old in October, 1953—were you living there during the whole year in 1953?

A. Yes, sir, I was.

Q. And that was at Nome?

A. No, sir, Fairbanks.

Q. At Fairbanks, Alaska? A. Yes, sir.

Q. In July, 1953, were you a passenger in an automobile in which there was an accident?

A. Yes, sir.

Q. What was the occasion of your being there?

A. Well, we went to Anchorage to see——

Q. Now wait just a minute, let me state it this way, what are the facts with reference to whether or not you made a trip in an automobile with some other people on or about the 30th of July, 1953, or just prior thereto?

A. You mean why did we make the trip?

Q. No, I said did you make one?

A. Yes, sir, I did.

Q. With whom did you make that trip?

A. My mother.

Q. Mrs. Naomi Hall? A. No, McDonald.

Q. Sure, Mrs. Naomi McDonald.

(Deposition of George A. McDonald, Jr.)

A. Yes, sir, and Mrs. Andrew J. Hall.

Q. Mrs. Andrew J. Hall, and who else was in the car?

A. And Mrs. Dickerson, our pastor's wife.

Q. Do you remember her first name?

A. Alvelda Dickerson, and Mrs. Earl Aronson.

Q. Is that A-r-o-n-s-o-n? A. Yes, sir.

Q. Do you know whether she was junior?

A. No, I don't know.

Q. Do you know Mrs. Aronson's first name?

A. Flo—Flo Aronson.

Q. Now how many in number were in the car, now? A. Five, sir.

Q. How many men in the car?

A. Just myself.

Q. You were the only man present?

A. Yes, sir.

Q. And there was your mother, check it and see if I have got it down properly in my own mind, your mother, Mrs. Naomi McDonald, Mrs. Dickerson—— A. Yes, sir.

Q. What did you say her first name was, Flora?

A. No, Mrs. Dickerson's name was Alvelda.

Q. Who was the other?

A. Mrs. Andrew J. Hall and Mrs. Earl Aronson.

Q. Then you say there was a total of five people in the car? A. Yes, sir.

Q. Now, in making this automobile trip, from what point did you leave, from what city?

A. We left from Fairbanks and went to Anchorage.

(Deposition of George A. McDonald, Jr.)

Q. Do you remember the day you left Fairbanks, and if so, what date it was?

A. Well, I will have to think a minute. I believe it was about the 28th of September of 1953.

Q. In whose car did you leave, whose car was it?

A. It was my mother and daddy's car—did I say September 28th?

Mr. Cobb: Uh-huh.

A. I mean July 28th.

Q. You want to make the correction to July?

A. Yes, sir, make the correction.

Q. You started out from what point?

A. We started out from Fairbanks.

Q. From Fairbanks, Alaska? A. Yes, sir.

Q. At what time of day did you start your trip?

A. I couldn't tell you, sir.

Q. You don't recall? A. I don't recall.

Q. Where were you proceeding to, what was your destination? A. Anchorage.

Q. Anchorage, Alaska?

A. Yes, sir. At the time we left Fairbanks our destination was Anchorage.

Q. What kind of car was it?

A. It was a 1953 Dodge, Coronet.

Q. A Coronet, who was driving when you left?

A. My mother.

Q. Where were you seated in the car?

A. By the right front door, in the front seat.

Q. And who was on the front seat besides your mother?

A. My mother was driving, Mrs. Hall was sit-

(Deposition of George A. McDonald, Jr.)
ting in the middle, and I was sitting by the passenger door in the front seat.

Q. You mean by passenger door, the right hand?

A. The right-hand side, yes, sir.

Q. Anyone on the rear seat?

A. Yes, sir, Mrs. Dickerson was sitting on the left side of the car in the back, and Mrs. Aronson was on the right.

Q. Well, you proceeded then from Fairbanks to Anchorage in one day, or what are the facts?

A. Yes, sir, in one day.

Q. And about what distance was that, just an estimate?

A. I would say about 400 miles, approximately.

Q. State whether or not the trip was made all at one time, or in one day?

A. It was made in one day.

Q. Do you know of your own knowledge as to whether or not this trip had any particular purpose, and if so, what was the purpose of the trip?

A. There was a purpose. We were going to Anchorage to see a friend of ours, and we were going to Valdez to a religious meeting.

Q. Had you discussed going to Valdez before you left Fairbanks?

A. I don't know if they had discussed it or not. All I know, when we left Anchorage we were going to Valdez to this religious meeting.

Q. Did you go to Anchorage to attend a religious meeting?

(Deposition of George A. McDonald, Jr.)

A. No, sir. We went to Anchorage to see a friend of ours.

Q. And was it a mutual friend?

A. It was a mutual friend, yes, sir.

Q. What was the relationship of you folks in the car, were you any kin to these people besides your mother?

A. No, sir. They were just friends of ours.

Q. Were they any kin to each other?

A. No, sir.

Q. Who had planned this trip, do you know?

A. Well, no, sir, not offhand. I believe they were all just really talking about going, I don't know who is the one that started talking about the trip.

Q. Was this, or not, a mutual friend you had down there? A. Yes, sir.

Q. Now was there any untoward event, anything out of the ordinary that occurred on the trip from Fairbanks to Anchorage? A. No, sir.

Q. Did you get to Anchorage in the nighttime?

A. We got there, it wasn't quite dark. It was in the late evening.

Q. Did you visit the friends?

A. Yes, sir, we went by and saw her.

Q. Well, where did you spend the night?

A. We spent the night at one of the motels there.

Q. Did you all go in the friend's house and visit with them socially?

A. Yes, sir, we were all good friends.

(Deposition of George A. McDonald, Jr.)

Q. Where had you known this friend?

A. In Fairbanks. She used to work in the church.

Q. You spoke about the church, state whether or not everybody in the car that made the trip from Fairbanks to Anchorage were all members of this same church, if you know?

A. Yes, sir, we were all members of the same church.

Q. What church was it?

A. First Baptist.

Q. Had you all traveled together before?

A. No, sir.

Q. What are the facts as to whether or not you had any car trouble on any part of the car, or engine, or any of the equipment on the car between Fairbanks and Anchorage?

A. No, sir. We had no trouble with the car whatsoever.

Q. Now, when you got to Anchorage, state whether or not you spent the night?

A. Yes, sir, we spent the night, I believe it was the Western Motel in Anchorage.

Q. Now, on the next day, did you visit the friend again?

A. Yes, sir, we went by and saw her again.

Q. And did you have a meal with her?

A. I don't recall that.

Q. All of you stayed together all the time?

A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. Did you separate after you got to Anchorage? A. No, sir, we all stayed together.

Q. Now, state whether or not there was any discussion had in your presence and hearing between all of you people who had made this trip down there, as to whether or not you should return to Fairbanks or proceed to some other city or place?

A. I don't recall any discussion on anything like that, no, sir.

Q. Well, when was it decided, if it was, or was it discussed as to whether or not you should proceed on to Valdez?

A. Yes, sir, we decided we would go on to Valdez from Anchorage.

Q. What was the purpose in going to Valdez?

A. To a religious meeting.

Q. Was there any particular meeting going on there?

A. Yes, sir, it was the Southern Baptist Revival, and we were going down to the meeting.

Q. Now, who entered into, if you know of your own knowledge—did you hear a discussion between the people that made up your traveling party, and that's the people you have named were in your car, coming down from Fairbanks to Anchorage, was the matter discussed generally between you?

A. Not that I know of, sir.

Q. Who made the decision to go to Valdez?

A. They all did.

Q. Well, did you hear any discussion about going to Valdez to this revival?

(Deposition of George A. McDonald, Jr.)

Mr. Cobb: It is understood all my objections to this might be considered hearsay, is that right, sir?

Mr. Pipkin: Yes, sir, that's right, you are not waiving them, if they want to make them up there."

[The following matter is from the District Court Reporter's Transcript:]

After reading through line 20, on page 17 of the deposition:

Mr. Johnson: I haven't renewed any objections of that kind, your Honor, and we are going to go ahead with it.

(Continued reading from line 21, page 17 of the deposition through line 21, page 21, "Mr. Cobb: That calls for a conclusion and hearsay."

"Q. Did you have any discussion with anybody?

A. No, sir, I didn't.

Q. Was it talked over?

A. I didn't say anything about it, I was just on vacation and just going along.

Q. As to the others, did you hear any discussion between them about going to Valdez?

A. Yes, sir, I believe they said something about it.

Q. When you left Anchorage, I will ask you whether or not you had some destination in mind?

A. Yes, sir, when we left Anchorage, we were going to Valdez.

Q. Did you know of your own knowledge that you were going to Valdez? A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. Did you understand what they were going for? A. Yes, sir, I did.

Q. Did you ever reach Valdez? A. No, sir.

Q. Now, from Anchorage over to Valdez, about how far is it? If you don't know the exact number of miles, give your best estimate.

A. I would say close to 300 miles.

Q. Do you recall what time of day you left Anchorage? A. No, sir, I don't.

Q. Was it daytime? A. Yes, sir, it was.

Q. Who was driving? A. My mother.

Q. And whose car were you in then?

A. We were in my mother's and daddy's car.

Q. Was that the same car you left Fairbanks in? A. Yes, sir, the same car.

Q. Do you know of your own knowledge anything about your mother's experience as a driver?

A. Yes, sir, she was a good driver.

Q. Do you know how long she had been driving?

A. No, sir, not offhand. I would say, maybe, fifteen years.

Q. Did you drive any on the trip from Anchorage toward Valdez?

A. Yes, sir, I drove for about 30 minutes. That was right after we left Anchorage.

Q. Did anyone else drive the car besides her and you? A. No, sir.

Q. Now what was the nature of the terrain on the road with reference to whether it was hilly or mountainous from Anchorage over to Valdez?

(Deposition of George A. McDonald, Jr.)

A. We had smooth, flat road up until about 35 miles outside of Valdez.

Q. What highway were you traveling on?

A. The Richardson.

Q. Called the Richardson Highway?

A. Yes, sir.

Q. State whether or not that's the main highway from Anchorage to Valdez?

A. Yes, sir, it is the main road. It is the only road.

Q. Now, did anything out of the ordinary occur to the automobile between Valdez and—as you were traveling towards Valdez, that is, the public highway, the Richardson Highway, between Anchorage and Valdez, I am not referring to the actual accident, I am referring to anything that may have happened before that, something that might have happened before that?

A. Yes, sir, we punctured our brakeline.

Q. What were the circumstances of that?

A. Well, the road was under construction in places, and was so bad in places it called for us to go from one side to the other, and they had a long strip of dirt piled up in the middle of the road, and my mother had to cross that pile of dirt to get on the other side of the road, and she hit a rock and it broke our brakeline, punctured our brakeline.

Q. Did you have occasion to observe where the brakeline was broken?

A. Yes, sir. I thought at first that we had punc-

(Deposition of George A. McDonald, Jr.)
tured our gas tank, so I asked her to stop and let me look.

Q. All right, and what called your attention to the fact that something may have happened, or may not have happened?

A. Because it made a noise, the rock hit mighty hard.

Q. Was the road graded up?

A. Yes, sir, it was graded up and dirt was piled in the middle of the road by a grader.

Q. Was there a crew along working on the road?

A. No, sir, it was late at night.

Q. At the time you speak of trouble with your brake lining, or your brakeline, it was nighttime?

A. Yes, sir, it was approximately midnight.

Q. Do you know what point you were on the road to Valdez?

A. Yes, sir, we were about 57 miles outside of Valdez.

Q. How do you fix that, was the road marked in any way? A. Yes, sir, it has mile posts.

Q. Had you experienced any trouble with the brakes up until that point?

A. No, sir, we had perfectly good brakes until that point.

Q. Is it your testimony you heard a noise like a rock striking under——

Mr. Cobb: That calls for a conclusion and hearsay."

[The following matter is from the District Court Reporter's Transcript:]

(Deposition of George A. McDonald, Jr.)

Mr. Johnson: We will renew that objection, your Honor.

The Court: He may answer.

(Continued reading deposition from line 22, page 21, through line 13, page 76, the last question being: "There wasn't any actual choice as to the passengers about getting out and staying in the middle of the wilderness in the middle of the night, was there?")

"Q. What called your attention to it?

A. Well, the noise of the rock.

Q. Did you get out of the car?

A. Yes, sir, I got out to see if the gas tank was hurt, and there was brake fluid all over the ground.

Q. All right, and you saw it?

A. I saw it, and smelled it.

Q. Are you familiar with the smell of brake fluid? A. Very familiar.

Q. What did you do then, if anything?

A. I walked around to her side of the car and leaned against the window and told her the brake-line was punctured and we didn't have any brake, and she tried the pedal and it went to the floor.

Q. Your mother was driving at that time?

A. Yes, sir, she was driving at that time.

Q. Do you recall on what side of the car the brake fluid seemed to be coming out of it?

A. It was dark and I couldn't see, but the best I could tell by the smell and where the puddle of fluid was, I think I would say it was back close to the left rear wheel.

(Deposition of George A. McDonald, Jr.)

Q. What are the facts, you actually got down and actually examined the brakes, or the hose, or whatever it is?

A. No, sir, I didn't crawl under the car and check it.

Q. These other parties in the car, do you recall whether they were all awake?

A. They were all awake.

Q. How long did you stop there?

A. About five minutes.

Q. State whether or not at that point on the highway, whether or not there were any—was any town, houses or garages, or anything?

A. No, sir, not right in that immediate vicinity.

Q. State whether or not there was any discussion by your mother with you in the car, in the presence of these other people that were in the car, as to whether you should proceed or not proceed?

A. Yes, sir, there was a discussion, and they decided to go on any try to find a place——

Q. Wait a minute, there was a discussion?

A. Yes, sir.

Q. Was it a general discussion between you folks in the car?

A. Yes, sir, it was discussed by everybody in the car.

Q. Did you reach a unanimous decision as to what you should do?

Mr. Cobb: I am going to object to that.

Q. All right, did anyone want to stay there?

(Deposition of George A. McDonald, Jr.)

Mr. Cobb: That would be objectionable, too, Mr. Pipkin.

Q. Did you hear anyone say whether they wanted to stay or they wanted to go on?

A. Yes, sir, they all decided to go.

Mr. Cobb: I object to that as not being responsive.

Q. All right, listen to the question carefully. State whether or not there was any discussion held in the car as to whether or not you would—all of you would proceed from that point forward?

A. Yes, sir, there was.

Q. And to what effect was the discussion—withdraw that. Was there anyone in the car who decided—that wanted to stay there or go forward, or what are the facts?

A. Well, everybody agreed to go on.

Mr. Cobb: I object to that as not being responsive to the question.

Q. I asked was there any agreement reached there between you all. I want to ask you this, was there any agreement reached at that time, you stated you had a discussion about it?

Mr. Cobb: That's leading and suggestive, Mr. Pipkin, and I object to it. You can ask what he heard and I won't object to that.

Q. Was any discussion had in your presence and hearing, after the time the brake fluid was seen on the ground? A. Yes, sir, there was.

Q. Where was this discussion had?

A. In the car.

(Deposition of George A. McDonald, Jr.)

Q. Between whom?

A. Between all the passengers in the car.

Q. Did you take part in the discussion?

A. Yes, sir, I did.

Q. What did you hear said in there, if anything?

A. Well, I told my mother what happened.

Q. All right, did you tell her in the presence of the other people?

A. Yes, sir, but I told her in a fairly low voice, and when I walked around and got back in the car, they asked what was wrong, and I told them.

Q. State whether or not you made any statement after you got in the car about the condition of the brakes? A. Yes, sir, I did.

Q. State whether or not it was made in a voice loud enough to be heard?

A. I told all of them.

Q. Do you have any recollection at this time as to what any particular person in the car may have said at that time, after you gave them that information?

A. No, sir, I don't recall anyone saying anything.

Q. Now, state whether or not there was any discussion in the car as to whether or not—in your presence and hearing, what did you hear said in the car then, if there was anything said, as to whether or not you should proceed?

A. Yes, sir, we had a discussion on whether we should go ahead or stay there.

Q. Was that had in the car?

(Deposition of George A. McDonald, Jr.)

A. It was in the car.

Q. What was the nature—all right, right on that point, state whether or not anyone in your presence and hearing, stated whether they wanted to leave the car or stay there at that point?

A. No, sir, everybody wanted to stay in the car, and they wanted to proceed.

Mr. Cobb: We object to that as not being responsive to the question.

Mr. Pipkin: Reread that question.

(Question read by the reporter.)

Q. Just answer the question yes or no, or however you want to answer it, but I asked whether there was anyone in the car—read the question. (Question read by the reporter.) Was there any discussion?

A. Yes, sir, there was a discussion, but not on leaving the car or anything like that.

Q. But there was a discussion?

A. Yes, sir.

Q. All right, state whether or not there was any expression, or any talk, or statement made in your presence and hearing there as to whether or not anyone wanted to leave the car or stay there?

A. No.

Q. Did they all stay in the car?

A. Yes, sir.

Q. Did your car proceed? A. Yes, sir.

Q. And how—right along there, what type of road was it, was that a mountainous country or hilly country? A. No, sir, it was flat country.

(Deposition of George A. McDonald, Jr.)

Q. Was anything said in your presence and hearing at the time you left, or before you left this point where you had stopped and found the brake fluid leaking, and you said as to how you would proceed without your brake?

A. Will you go over that again? I don't quite understand that one, sir.

Q. Was anything said about the brakes when you left there, in your presence and hearing, in the car? A. Yes, sir.

Q. What was said?

A. Well, they decided to go on, and to try to find a place to fix it.

Q. Was your car equipped with any other type of brake?

A. Yes, sir, it had a handbrake, an emergency brake.

Q. Well, did you know, and was it apparent to you, that you had no foot brake? I will put it this way, withdraw that. Do you know whether or not that this leaking of the fluid affected any of the brakes on the car? A. Yes, sir, definitely.

Q. What did it affect?

A. Didn't have any foot brake at all.

Q. Was the car equipped with any other brake besides——

A. Yes, sir, the handbrake, the emergency brake.

Q. Where was it?

A. It was on the left-hand side of the car, under the dashboard, I believe it was. I can't rightly recall.

(Deposition of George A. McDonald, Jr.)

Q. What are the facts with reference to whether or not any repairs were attempted to be made, or made, at the time you stopped there, when you noticed the brake fluid on the ground?

A. No, sir.

Q. Now, do you recall whether or not you passed along the highway after you started up again, was your mother still driving? A. Yes, sir.

Q. Was everyone in the seat of the car where they had been, or not? A. Yes, sir.

Q. Was it daytime or nighttime?

A. It was night, about 12:00 midnight.

Q. About 12:00 midnight, is that the time you estimate you had this break in the line?

A. Brake trouble, yes, sir.

Q. Were you meeting any traffic along the highway? A. No, sir, none whatsoever.

Q. State whether or not you passed any shops, houses, or anything along the way?

A. We passed nothing, no houses, no garages, no nothing.

Q. What was the first place you came to, if you recall, where there was any house, garage or town?

A. 56-mile lodge.

Q. Can you describe the location, was it a settlement of houses, or a garage, or what was it?

A. No, sir, it was a little barn—it was a little filling station and had some pumps out in front.

Q. State whether or not you observed it was open or closed? A. It was open.

Q. It was open? A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. State whether or not your party, or any of you, got out and went in?

A. No, sir, they all stayed in the car.

Q. Did you get out of the car? A. No, sir.

Q. Did anybody get out of the car at that point?

A. No, sir.

Q. State whether or not you talked to anybody there?

A. Yes, sir, we pulled up in front and this man came out from inside of the place and asked could he help us, and we told him our brakeline was broken and we would like to get it fixed.

Q. Who was he talking to?

A. He was talking to my mother.

Q. Where was he standing, over on the front of the place, or did he come up to the car?

A. He came up to the car.

Q. Was that conversation had in the presence and hearing of the other passengers in the car?

A. Absolutely.

Q. State whether or not the man stated—state what he said with reference to whether it could be fixed there, or not.

A. No, we asked him the question, and he said that he didn't have the facilities to fix it, that the brakeline would have to be pinched off, and he didn't have any facilities to do that with, and the road was good from that point on to Valdez.

Q. Is that 56-mile post, is that the true mileage, it is 56 miles? A. Yes, sir, it is 56 miles.

Q. Did anybody eat anything out there?

(Deposition of George A. McDonald, Jr.)

A. No, sir, we didn't get out of the car.

Q. Had you ever been over that road before?

A. No, sir.

Q. Do you know of your own knowledge—were you familiar with the road ahead? A. No, sir.

Q. And you estimate at that point that you were about 56 or 57 miles?

A. At that lodge we were 56 miles from Valdez. They are marked off.

Q. How far from 56-mile lodge back to where you broke your brakeline?

A. About one mile. It happened about one mile, at the 57-mile road post.

Q. Did I understand you to say—how far did you say it was back from the 57-mile post that you had that accident?

A. You mean that we broke our brakeline?

Q. Yes.

A. We broke our brakeline at approximately the 57-mile post, and drove one mile further to the 56 lodge.

Q. I see. Did you notice any mile posts back there, or are you just estimating that?

A. No, sir, they are marked with mile posts.

Q. Uh-huh. Now, did you then proceed, did you kill your motor or engine there at that lodge, do you remember? A. No, sir, we didn't.

Q. State whether or not any repairs were made on the brakes there? A. No repairs were made.

Q. State the facts as to whether or not anybody

(Deposition of George A. McDonald, Jr.)

asked to get out of the car, in your presence or hearing?

A. No one asked to get out of the car.

Q. State the facts about whether or not there was any discussion in the car about whether you should proceed to Valdez?

A. Well, there was there.

Q. There was a discussion there, what was the discussion?

A. Well, we talked about whether we should stay there or drive on in, because we were told at 56-mile lodge that the road was good to Valdez and that we could drive it without any trouble.

Q. Who told you that?

A. The fellow that came outside.

Q. State whether you know of your own knowledge that that statement of his was made in the presence and hearing of the other people in the car?

A. It was made in the presence of everyone in the car.

Q. Well, then did you proceed to Valdez?

A. Yes, sir, we proceeded on.

Q. And how far, did you have to stop anywhere along after you left the 56-mile lodge?

A. Yes, sir, we stopped one time.

Q. Do you recall for what purpose or what was the occasion for your stopping?

A. There was a road that tied into the road we were on, and there was a barricade there where they had been working on it, and we had to stop and go around it.

(Deposition of George A. McDonald, Jr.)

Q. Did you have occasion to observe how your mother drove? A. Yes, sir.

Q. I am talking about from the 56-mile lodge on forward? A. Yes, sir.

Q. Did you have occasion to observe her driving? A. Yes, sir, I did.

Q. Were you still on the front seat?

A. Yes, sir.

Q. In what manner was she driving?

A. Well, she was driving very slowly.

Q. At about what speed would you say?

A. Approximately 30 or 40.

Q. What was the condition of the road from that 56-mile post, we will say, forward there for a distance——

A. Well, up to about the 52-mile post it was still under construction. Then we hit pavement, hit blacktop.

Q. Now when you made that stop for these repairs, and having to drive around that you have spoken about, how was the car brought to a stop?

A. With the hand brake.

Q. State whether or not you observed there was any difficulty in making the stop?

A. No, sir, it was a good stop. There was no trouble at all. The hand brake was working perfect.

Q. Now, when you left there, did you go on down the road toward Valdez? A. Yes, sir.

Q. State whether or not along there at this point where you made this stop, and from there

(Deposition of George A. McDonald, Jr.)

forward some distance, whether the road was hilly, mountainous, or flat?

A. Well, there were a few hills, some hills that weren't even big enough to notice, and we didn't have any trouble, sir.

Q. Now do you know where Thompson's Pass is on the highway? A. Yes, sir, I do.

Q. Do you recall approaching Thompson Pass?

A. No, sir, there was no signs or nothing, and you couldn't even tell that you were climbing.

Q. But I say, do you recall approaching?

A. Oh, yes, sir, I recall it.

Q. Did you know it was down there?

A. No, sir, we didn't.

Q. Now this was—was it still dark?

A. Yes, sir.

Q. What time of the morning was this getting to be, or at night?

A. It was about 12:30, something like that.

Q. About 12:30 at night? A. Yes, sir.

Q. State the facts with reference to whether or not you finally came to Thompson Pass?

A. Yes, sir, we finally got to Thompson Pass.

Q. Now, state whether or not at the point where Thompson Pass is, the country is mountainous?

A. Yes, sir, it is mountainous at Thompson's Pass. You don't notice it going up like coming from Anchorage to Valdez, you don't even notice that you are climbing.

Q. Well, I will ask you if you noticed whether

(Deposition of George A. McDonald, Jr.)

or not you were climbing a mountain, or going up?

A. No, sir, we didn't notice it.

Q. Did you have any trouble with your car on with your handbrake between the 56-mile lodge and the pass? A. No, sir.

Q. State whether or not you realized, when you got to the pass—if you knew you had arrived at the pass?

A. Yes, sir, because when we got to the top——

Q. You realized it? A. Yes, sir.

Q. What caused this realization?

A. We got up there, and all of a sudden the road starting dropping out from under us, we started going down.

Q. State where or not you were all still in the car? A. Yes, sir, we were all still in the car.

Q. All five of you were in the car?

A. Yes, sir, all five of us were in the car.

Q. Did any of you get out of the car?

A. No, sir.

Q. Were you on top of the pass?

A. We were on top.

Q. State whether or not you knew you were on top of the pass?

Mr. Cobb: I object to that as being leading and suggestive.

Q. Well, where were you when you stopped?

A. We were directly on top of Thompson Pass.

Q. State whether or not—what the facts are, from the point you stopped you could tell the road went downward from that point?

(Deposition of George A. McDonald, Jr.)

Mr. Cobb: I object to that as leading and suggestive.

Q. State whether or not you could tell whether the road went up or down at that point?

A. We could definitely tell.

Q. What did it appear? A. Down.

Q. How did it appear, whether or not a gentle slope down, or a steep slope down?

Mr. Cobb: I object to that as leading and suggestive, and putting words in the mouth of the witness.

Q. State the facts as to whether or not you could tell from looking out the front of your car, you could tell whether or not the road went up or down, upon Thompson Pass?

A. Yes, sir, you could definitely tell.

Mr. Cobb: I am going to object to that as not being responsive. This witness was asked whether he could tell, and his answer is "you could," rather than what the witness, himself, could tell.

Q. Could you tell, yourself? A. Yes, sir.

Q. How did it appear? A. A steep grade.

Q. What are the facts at that point, whether anybody got out of the car?

A. No, sir, we just sat there.

Q. You just sat there? A. Yes, sir.

Q. Was any discussion had in the car as to whether or not you should proceed?

A. Yes, sir, there was.

Q. And what, if anything, was decided in the car?

(Deposition of George A. McDonald, Jr.)

A. They decided that we should hold a prayer meeting right there.

Q. All right, decided to hold a prayer meeting?

A. Yes, sir.

Q. Were you going to pray about it?

A. Yes, sir.

Q. What are the facts as to whether or not there was a prayer meeting held, I mean, a prayer said? A. Yes, sir, there was a prayer.

Q. Was it an outloud prayer?

A. No, sir, everybody did their own praying.

Q. Out of the car or in the car?

A. No, sir, inside the car.

Q. How long did that take, how much time did that consume, that prayer?

A. About five minutes.

Q. Was any statement made before you folks went into prayer as to what you were going to pray about, in your presence and hearing?

A. Not that I recall.

Q. So, so far as you were personally concerned, what were you praying about?

A. That we would get down that mountain all right.

Q. Do you know of your own knowledge whether your mother had ever been over that trail before this time? A. She had never been on it before.

Q. Do you know whether or not any of the other parties in the car had ever been over the trail before?

A. None of them had ever been over it, either.

(Deposition of George A. McDonald, Jr.)

Q. Did anyone there appear to you, from anything they said or did, to be apprehensive about whether they should stay or proceed?

Mr. Cobb: That's leading and suggestive, and I object to it on that ground.

Q. What are the facts with reference as to whether between 57-mile post and Thompson's Pass, you passed any houses or garages? A. No, sir.

Q. At any time after you had this brake out, did you pass any trucks or anybody on the highway?

A. No, sir.

Q. What are the facts with reference to ever stopping and asking anybody to fix your brakes, except the man at 57-lodge that you spoke about?

A. No, sir, we didn't stop any more.

Q. Before you got down there, did you pass anybody on the highway between the time you had this accident with the brake and the fluid on the ground that you described about and the time that you got to 57-mile lodge, do you recall passing anybody? A. Not that I can recall.

Q. Not that you can recall. Do you recall whether or not you passed any garages or repair shops or town between the time you broke the brake-line and the time you got to the 57-mile post?

A. No, sir.

Q. I asked whether you recall any or not, and you said "no, sir," I didn't ask whether you recall or not, I asked whether you passed any.

A. No, sir, we didn't.

Q. When up on this pass, saying this prayer, was it night or day?

(Deposition of George A. McDonald, Jr.)

A. It was approximately 1:30 in the morning.

Q. What was the condition of the weather, if you remember? A. Cool and foggy.

Q. How bad was the fog, light or heavy?

A. Fairly heavy.

Q. While you were stopped—did you proceed along in the pass and come to a stop, or just made the one stop at the top, or what are the facts?

A. We just made the one stop and that was at the top.

Q. How long did this prayer meeting continue in the car? A. About five minutes.

Q. Did you hear anybody praying outloud?

A. No, sir.

Q. State what the facts are with reference to whether or not you heard anyone state they felt they had any answer to any prayer, or whether they felt they should stay or go, or what are the facts? What was said in your presence and hearing there after the prayer?

A. I don't recall anything being said, except, I don't know who it was, but someone suggested that we go on.

Q. Do you know who made that suggestion?

A. No, I don't.

Q. State the facts with reference to whether or not anyone left the car at that point?

A. No, sir, no one left the car.

Q. State whether or not in your presence and hearing was there any discussion about whether you should proceed down the hill, down the moun-

(Deposition of George A. McDonald, Jr.)
tain, or down the pass, or to continue on the road?

A. Yes, sir, there was a little discussion on that.

Q. Do you recall the effect of it, or what was said, do you recall the exact words anyone said?

A. Well, not the exact words. I do recall someone suggesting that we go ahead, and my mother asked everybody in the car if they were willing to go ahead, and they all agreed on that.

Mr. Cobb: That's not responsive to the question.

Q. Reread the question. (Question read by the reporter.) Do you recall the exact words anyone said, just say whether you recall what anyone said, or not? A. No.

Q. You do not recall the exact words, is that what you are saying? A. That's right.

Q. Do you recall the general trend of anyone's words? A. Yes, sir.

Q. What was that, and if so, who was doing the talking, and whether or not it was in the presence and hearing of the others?

A. I don't know exactly who it was that made the statement to go ahead, but it was in the presence where everyone could hear it, and we all decided that it would be all right to go ahead.

Mr. Cobb: I object to the last part of that answer as not being responsive.

Mr. Pipkin: Just strike that part about they all decided to go ahead.

Q. Did anyone say in your presence and hearing that they did not care to proceed? A. No.

(Deposition of George A. McDonald, Jr.)

Q. State whether or not anyone in the car made any complaint about going forward, or not?

A. No, sir.

Q. State the facts with reference to whether or not anybody in the car made any statement or movement as to about whether they would or would not stay in the car?

A. No, sir, no one made such a movement.

Q. Any houses or anything in this pass?

A. No, sir.

Q. Any lights there of any kind? A. No, sir.

Q. Any warning signs there of any kind?

A. No, sir.

Q. I believe you—did you at that point hear your mother make any statement? A. Yes, sir.

Q. All right, what did she say?

A. She asked everybody in the car if they were willing to go ahead.

Q. And what was the reply, if you know?

A. Everybody agreed to go on.

Q. State then whether or not you then proceeded down the mountain? A. We did.

Q. Who was driving? A. My mother.

Q. Now what was the nature of the road, was it pavement, or gravel, or dirt, or what was it?

A. It was blacktopped, asphalt.

Q. State whether or not the road ran straight or was winding, going up or down hill?

A. It was a winding road going down hill.

Q. Now, as you went along there, describe to us, after you started down the pass, not the pass,

(Deposition of George A. McDonald, Jr.)

started down the road, continued from this Thompson Pass on towards Valdez, state what happened.

A. Well, my mother—the car started picking up too much speed, so my mother pulled the emergency brake, pulled on that to try to slow the car down, or to stop it.

Q. How far down had you gone before she started to pick up what you say too much speed?

A. I would say approximately a quarter to half a mile.

Q. State whether or not the car was in gear?

A. It was in gear at the time.

Q. Do you know what gear, did you observe?

A. Yes, sir, it was in third gear.

Q. Now as you got down about a quarter of a mile, you say, did the car slow down?

A. No, sir, it picked up speed.

Q. State whether or not it was downgrade or upgrade part of the way, or what was the nature of it?

A. The road was downgrade all the way.

Q. State whether or not it was steep or gentle?

A. It was steep.

Q. What were the nature of the curves, with reference to whether they were sharp or gentle?

A. They were about a medium curve, slightly banked. There wasn't any hairpin turns.

Q. Did your mother make any change in her method of driving, as to what part of the road she was driving on? A. Yes, sir, definitely.

Q. Where was she driving the car, operating the

(Deposition of George A. McDonald, Jr.)
car, what part of the road, the side, middle, or what?

A. Well, she stayed on her side until we would get to a curve, then she would either hug the middle or go on the inside of the curve.

Q. When you were about a quarter of a mile down—have you ever driven a car? A. Yes, sir.

Q. How much experience have you had?

A. About four years.

Q. Do you have a driver's license?

A. Yes, sir.

Q. When you got about as much as a quarter of a mile down the highway, as you speak there, could you estimate the speed of the car?

A. I would say approximately 65, maybe 70.

Q. State whether or not your mother then made any attempt to stop the car or did she just keep going, or what are the facts?

A. She attempted to stop the car.

Q. Did you observe this, yourself, or not?

A. I did.

Q. Where were you riding at that time?

A. By the right door, in the front seat.

Q. Do you know of your own knowledge, after you left the top of this pass and going down, what brake was working on the car?

A. Yes, sir, the emergency brake was the only one working.

Q. State whether or not you observed whether your mother attempted to stop the car when the speed picked up, that you referred to?

(Deposition of George A. McDonald, Jr.)

A. Yes, sir, I observed that she did try to stop it.

Q. State what means she used, and her actions, with regard thereto.

A. Well, she tried the emergency brake first, but the car had too much momentum and it wouldn't hold, and she tried putting it in a lower gear, and it wouldn't go in a lower gear.

Q. State whether or not the car was making any sound with regard to the gears, or what?

A. Well, there was a clashing sound in the gears, a grinding.

Q. State whether or not she stopped the car?

A. No, sir, she didn't.

Q. State whether or not she was making an effort to stop the car?

A. She was. She was trying to stop it.

Q. Did you do anything to try to stop it?

A. No, sir.

Q. Did anybody else? A. No, sir.

Q. State whether or not you observed anything that she did with reference to the gears on the car?

A. Well, she tried to get it in a lower gear, and it wouldn't go, and she tried to ram it up in reverse, and it wouldn't go, and so she tried again to ram it up in a lower gear, and it wouldn't go, so she put it in neutral and turned the engine off.

Q. State whether or not you observed her attempting to get the car in these several gears?

A. Yes, sir, I saw her trying to get it in the gears.

(Deposition of George A. McDonald, Jr.)

Q. State whether or not the car would go in any gear. A. It wouldn't go.

Q. Now, how far did you continue, you say the car didn't stop, how far did you continue on down the road?

A. You mean before we had the wreck?

Q. Before you had an accident?

A. We went down approximately three miles.

Q. Then what happened after you had gone about three miles, what, if anything, happened?

A. We were going around a fairly sharp curve and it curved to the right, and my mother had the emergency brake up all the way down.

Q. When you say "up," what do you mean, "up?"

A. Well, she had the emergency brake up, had it applied, and started around this curve, and the emergency brake was hot and it grabbed, and we rolled over.

Q. State the facts with reference to whether or not going down up to that point she was ever able to get the car in gear? A. No, sir.

Q. Now when the car rolled over, did you fall out? A. Not the first time, no, sir.

Q. Now what was the nature of the sides of the road at that point where you made this turn, did the car turn over? A. Yes, sir, it turned over.

Q. Did it leave the highway? A. Yes, sir.

Q. Where did it go?

A. I don't know where it went. It rolled over five times.

(Deposition of George A. McDonald, Jr.)

Q. State whether or not the side, there was any canyon, or ditching, or ditch, or anything on the side of the road.

A. On the left-hand side there was a severe drop.

Q. Could you see that before you got to the curve? A. Yes, sir, we could.

Q. State whether or not, in going down the grade there, were your lights burning?

A. They were burning.

Q. State whether or not you met any traffic going down? A. No, sir, we met no traffic.

Q. Now how far—do you remember leaving the road?

A. No, sir, all I can remember is when it turned over that first time.

Q. Did it throw anybody out on the first roll?

A. Not that I know of.

Q. Do you remember anything after that?

A. Not for quite a while. After the car had stopped, that was the first I remembered anything about it.

Q. Was anybody in the car then?

A. No, sir, they were all out.

Q. Everybody was out of the car?

A. Yes, sir.

Q. Were you in the car?

A. No, sir, I was out.

Q. Did you get up and walk around any?

A. I couldn't.

Q. Were you injured in the accident?

A. Yes, sir, I was.

(Deposition of George A. McDonald, Jr.)

Q. How long did you stay there?

A. Approximately 30 minutes to an hour.

Q. Did you—were you knocked unconscious?

A. Yes, sir.

Q. Where were you when you came to yourself?

A. I was up on the shoulder of the road.

Q. How far from the blacktop?

A. I was laying right on it.

Q. You were?

A. I was laying right by it.

Q. Could you see where the car was?

A. Yes, sir, the car was right below me. The lights were pointing up in my face.

Q. Were there any lights along the highway? What are the facts, as you were going down, were there any lights lighting these turns?

A. No, sir.

Q. Did you pass any houses or shops going down? A. No, sir.

Q. Now, as you all were going along back up there where you had this accident that you related, back with the brakeline, back at that point, up until the time you were making this drive, and you stated you heard a rock or heard some noise under the car when you attempted to cross over that dirt you spoke of, was it in the middle of the highway?

A. Yes, sir, it was. It was in the middle of the highway.

Q. About how fast was she going when she crossed that?

(Deposition of George A. McDonald, Jr.)

A. I would say about ten or maybe fifteen miles an hour.

Q. State the facts with reference to whether or not when you were on Thompson's Pass, state whether or not you heard anyone make any objection to going down the mountain?

Mr. Cobb: I object to that as leading and suggestive.

He can state what he heard.

Q. State whether or not you heard anyone state whether or not you should proceed down the mountain.

Mr. Cobb: The same objection.

Q. Did they state what they should do, spend the night, or go forward, or go back?

Mr. Cobb: I object on the same ground, as leading and suggestive. He can state what was actually said.

Q. I will ask you, did anyone there in your presence, did you hear anyone object to going down the mountainside?

Mr. Cobb: The same objection.

A. Not that I recall. It has been so long since that thing happened, it is hard to remember all the details.

Q. State the facts as to whether or not you are under military orders to proceed to the State of Maine from Beaumont, Texas? A. Yes, sir.

Q. State the day you are required to leave with your orders, in order to make your point or place of destination?

(Deposition of George A. McDonald, Jr.)

A. Well, I will leave here approximately the 15th or 16th.

Q. Of what month? A. Of October, 1956.

Q. I believe you can proceed with the witness.

Cross Examination

Q. (By Mr. Cobb): You understand the proceeding we are having here today, it is a little informal around this library table, but it is just the same as if you were up in that Federal Court in Fairbanks or Anchorage, wherever this case is going to be tried, and you were under oath and testifying before the court up there, you understand that?

A. Yes, sir.

Q. And that you are to give true, complete and full answers to my questions, is that right?

A. Yes, sir.

Q. The reporter will write down my questions and your answers, and they can be used in evidence in this case under the proper circumstances, you understand that, don't you? A. Yes, sir.

Q. Before you answer any question, or if I go a little too fast for you and say something you don't understand, you ask Mr. Pipkin to explain it to you. Mr. Pipkin is representing the attorney for your father, or you can ask me to explain it, will you do that? A. I sure will.

Q. How old were you when this happened?

A. Fifteen.

Q. Just barely fifteen? A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. And I understand you say you drove part of that time? A. Yes, sir.

Q. Did you have a driver's license at that time?

A. No, sir, I didn't.

Q. Did anybody drive that car besides you and your mother? A. No, sir.

Q. Who was the friend you went to see in Anchorage? A. Miss Poe Hamilton.

Q. Is she still up there?

A. I couldn't tell you.

Q. Is she married now, or do you know?

A. I don't know, I haven't seen or heard from her since 1953.

Q. Now you say before you all ever left Fairbanks that you were going to Anchorage just to see this one lady? A. Yes, sir.

Q. And stay overnight there, and to proceed to Valdez? A. Yes, sir.

Q. It wasn't a sight-seeing trip?

A. Well, it was more or less, but we wanted to see that part of the country, and we were going to see this Miss Hamilton and then down to the revival, and that gave us a perfect opportunity to do a little sight seeing.

Q. Those details weren't all worked out before you left, you were going to take it easy, you had no specific place to go, or time to be there, is that right?

A. No, sir, we were going on the trip for a special reason.

Q. A special reason, the revival meeting?

(Deposition of George A. McDonald, Jr.)

A. Yes, sir.

Q. What day was it supposed to start?

A. I believe, sir, it was supposed to start the 31st.

Q. The 31st? A. Yes, sir, the 31st of July.

Q. Do you remember whether that was Sunday or Monday? A. No, sir.

Q. Do you remember what day this accident happened? A. I don't recall what day it was.

Q. Nobody in that car drove besides you and your mother on any part of the trip, is that correct? A. That is correct.

Q. Everybody but you and Mrs. Dickerson were killed in the accident? A. Yes, sir.

Q. Mrs. Hall and Mrs. Aronson and your mother were killed in the accident? A. That's right.

Q. Were you hospitalized at any time?

A. Yes, sir.

Q. For how long?

A. From the morning of the 31st of July, 1953 until about the 1st or 2nd of September, 1953.

Q. Then were you released from the hospital?

A. Then I was released from the hospital.

Q. Where were you hospitalized?

A. In Fairbanks, Alaska.

Q. They took you up to Fairbanks?

A. Yes, sir.

Q. About three or four hundred miles from where it happened? A. Yes, sir.

Q. Then what did you do after you left the hospital?

(Deposition of George A. McDonald, Jr.)

A. Well, I stayed there in Fairbanks for about two weeks, and one of my aunts from Austin came up there, and I came back with her.

Q. Did your daddy stay up there?

A. Yes, sir.

Q. There is no doubt that the accident when the brakeline broke happened at the 57-mile post?

A. That's right.

Q. That is, it didn't happen at the 70-mile post or anywhere else?

A. No, sir, it happened at approximately the 57-mile post.

Q. Your father is a defendant in this action, you understand that? A. Yes, sir.

Q. He is being sued, you understand that?

A. I understand that.

Q. Do you know of any way your father might have gotten any information about where the brakeline was knocked out, other than by talking to you?

A. Maybe by talking to Mrs. Dickerson.

Q. But you all were the only survivors?

A. We were the only survivors.

Q. Was Mrs. Dickerson severely injured?

A. No, sir.

Q. Did you have a head injury from this accident? A. Yes, sir.

Q. How severe?

A. Skull fracture in three places, and this (indicating).

Q. And, I suppose, along with that a rather severe concussion and contusions?

(Deposition of George A. McDonald, Jr.)

A. Yes, sir.

Q. Are you all right now?

A. Oh, yes, sir, just as normal as anybody. I got in the service.

Q. You got in or were invited to join?

A. No, I joined of my own free will.

Q. How long have you been in?

A. About three months, or three and a half months, something like that.

Q. You don't know where your father might have gotten any idea that this accident happend at the 70-mile post?

A. No, I sure don't, because we didn't drive that far before we had that accident.

Q. When talking about 57-miles, are they talking about 57 miles from Valdez or from the juncture of these two points?

A. No, sir, it is 57 miles from Valdez.

Q. In other words, going back up the road from actually where you all were heading, they start at one out of Valdez? A. Yes, sir.

Q. And so the 57-mile post would be 57 miles out of Valdez? A. That's right.

Q. Now you drove—incidentally, I am not too familiar with Alaska, you have been up there and I haven't, you can tell me something about the summertime up there. What is the weather like in the summertime in July?

A. It gets fairly warm.

Q. In the daytime?

A. Yes, sir. It gets cool at night.

(Deposition of George A. McDonald, Jr.)

Q. How long are the days up there in the summertime?

A. Well, they usually run about twenty-three and a half hours a day.

Q. You mean, it is really that long?

A. Yes, sir.

Q. You mean it is light that long?

A. Yes, sir.

Q. In July? A. Sometimes.

Q. I am not talking about up in the real extreme northern part of Alaska, I am talking about where you all were.

A. Well, it usually stays light quite a while, but in 1953 it started getting dark early.

Q. How early?

A. Oh, I would say around 8:00 or 8:30, something like that.

Q. When would it get light?

A. About 4:00 in the morning, I guess, something like that.

Q. That's around in this southern part where you were? A. Yes, sir.

Q. But up in Fairbanks it would stay light approximately 23 hours a day?

A. Approximately, I am not sure.

Q. That's about June and July?

A. Yes, sir, about June and July.

Q. That didn't mean the sun was shining all that time, or was it shining all that time?

A. Most of the time it was.

(Deposition of George A. McDonald, Jr.)

Q. Was it raining or cloudy that you spent from the 28th to 31st, or had it been good weather?

A. It had been good weather, yes, sir.

Q. Was this road muddy or dry?

A. It was dry.

Q. You drove all the way to Anchorage from Fairbanks in one day? A. Yes, sir.

Q. This highway you go from Fairbanks to where you cut off to go to Anchorage, that's what is called the Thompson Highway?

A. That's right.

Q. And the cross one is called the Glenn Highway, is that right? A. Yes, sir.

Q. And the intersection where they come together is the intersection of Glenn and Thompson?

A. Yes, sir.

Q. You got in there early that night?

A. I would say around 8:00 o'clock.

Q. You went straight to the motel?

A. No, sir, we went to the friend's house and stayed approximately two hours, and then went to the motel.

Q. That would be the 28th? A. Yes, sir.

Q. What did you do the 29th?

A. We went back the morning of the 29th and saw Miss Hamilton again, and stayed there until up in the middle of the morning, and then we went down to Seward.

Q. You went to Seward? A. Yes, sir.

Q. How long did you stay in Seward?

A. I don't know.

(Deposition of George A. McDonald, Jr.)

Q. Then you came back and spent the night at Anchorage?

A. Yes, sir, we came back in the late evening and went to see Miss Hamilton again, and when we left there, we told her goodbye and went and got us a motel and spent the night in Anchorage again, and the morning of the 30th, we left.

Q. This motel, how many rooms did you all get get there, three rooms?

A. No, sir, we took two rooms.

Q. You were in one?

A. My mother and Mrs. Aronson and I were in one room, and Mrs. Hall and Mrs. Dickerson were in the other.

Q. Do you know whether any of these other ladies were drivers, did you know them before?

A. Yes, sir, I knew all of them for quite a while.

Q. Did you know whether any of them had driven that Dodge? A. No, sir, they hadn't.

Q. What kind of shift did it have on it?

A. Gyro-torp.

Q. Gyro-torp? A. Yes, sir.

Q. Did you have to use the clutch to shift?

A. I will try to explain it as best I can. It has a four-speed transmission——

Q. You mean four forward speeds?

A. Four forward speeds and a reverse, and on a standard shift transmission, you know where second is?

Q. Uh-huh.

(Deposition of George A. McDonald, Jr.)

A. Well, first and second on our car was in that position, and you had to use your clutch to be in that position, and when it starts moving, you let off your gas and shift in second, and when you let off the clutch, it would automatically go into third or fourth, I don't know which it was.

Q. This gear shift was on the steering column?

A. Yes, sir, on the steering column.

Q. My car, if you pull it all the way down, that's low gear. A. Yes, sir.

Q. What was the gear in that car?

A. There wasn't one, it was blocked off.

Q. This clutch was only used to shift into reverse, is that it?

A. Into reverse, and from second to third, or from third to second.

Q. On those Dodges you can shift them without using the clutch? A. No, sir, you can't.

Q. Had you driven this Dodge?

A. Yes, sir, some.

Q. Did you ever try to shift without the clutch?

A. No, sir, but I had a little 1940 Dodge with the same transmission in it.

A. No, sir, but I had a little 1949 Dodge with the same transmission in it, and I had tried it and it can't be done.

Q. But you had never driven this car much before the accident? A. No, sir.

Q. Did Mrs. Aronson ever drive that car?

A. No, sir.

Q. She didn't drive it while you were there?

(Deposition of George A. McDonald, Jr.)

A. No, sir.

Q. Did any of the other passengers ever drive that Dodge? A. No, sir.

Q. How old is Mrs. Aronson?

A. I couldn't tell you. I would say about 45.

Q. And Mrs. Dickerson, how old is she?

A. She was about 35.

Q. Was Mrs. Dickerson as seriously injured in this accident as you were?

A. No, sir, she luckily wasn't injured very much at all. She was bruised up.

Q. When you first left Anchorage you say you drove about 30 miles out of there?

A. No, sir, I drove for about 30 minutes.

Q. You drove for about 30 minutes, so you wouldn't have made 30 miles?

A. No, sir, I was going slow.

Q. Why was it you changed with your mother?

A. Well, I just wanted to drive a little while and she let me drive.

Q. That was a car owned by your father?

A. Yes, sir.

Q. And your mother? A. Yes, sir.

Q. And they were living together?

A. Yes, sir.

Q. Did they have two cars?

A. That's the only car we had.

Q. For whatever purpose the family needed an automobile, that was it? A. That was it.

Q. It was furnished by your father to your mother with his knowledge? A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. I mean she didn't sneak off with it

A. No, sir.

Q. And it was for this particular trip in mind?

A. That's right.

Q. Do you know whether there were any instructions about whether you should drive it or not?

A. No, sir.

Q. You didn't hear any anyhow?

A. No, sir, I didn't hear any. He didn't care if I drove a little bit.

Q. But you only drove about 30 minutes?

A. About 30 minutes.

Q. None of the other ladies drove any?

A. No, sir.

Q. What time did you leave Anchorage going back up to the Thompson-Glenn Highway?

A. I couldn't say for sure, maybe 8:30 or 9:00 on the morning of the 30th.

Q. At the time you left there, is it your testimony, and I want to be sure to understand it, that everybody knew at that point that they were going to go to Valdez? A. That's right.

Q. How do you know they knew that, did you talk to all of them?

A. Well, there was something said on the road about the revival at Valdez.

Q. There was something said on the road about it, in other words then nobody had ever——

A. See, that's why we left Fairbanks was to go down there to the revival, and so I was aware of it all the time. I mean there actually hadn't even

(Deposition of George A. McDonald, Jr.)

been anything brought out and said anything definite——

Q. You don't know what arrangements or agreements had been made by any of the other ladies on this trip? A. No, sir, no agreements.

Q. What you are testifying about going to Valdez is based on your own understanding?

A. On my own understanding.

Q. And you don't know what these other people understood about it? A. That's right.

Q. Is there a roadhouse or anything on these two highways where they intersect?

A. I don't recall.

Q. About how far is it?

A. I would say about 150 miles.

Q. Isn't it a fact at that intersection these two other ladies requested your mother to go on back to Fairbanks at that time? A. Not that I recall.

Q. There could have been such a request and you don't remember it, couldn't there?

A. That's right.

Q. But at that intersection you turned to your right and proceeded on—is that highway 1?

A. No, that's the Richardson Highway.

Q. You proceeded then to go to Valdez?

A. Yes, sir.

Q. Now you say your mother had never been over these highways before? A. That's right.

Q. Had any of these other ladies that you know of? A. Not that I know of.

Q. Well, you had a map in your car, didn't you?

A. I don't recall.

(Deposition of George A. McDonald, Jr.)

Q. You mean to say you all were going to make a round trip in Alaska over roads that you never had been on——

A. They are marked.

Q. ——that nobody with you had ever been on and you didn't have a map?

A. They might have had a map in the car, I don't remember.

Q. You don't remember? A. No, sir.

Q. The main use of a map on Alaskan highways is to find out where filling stations and lodges and places are? A. That's right.

Q. It is not like driving from Beaumont to Houston, you don't have to worry about gasoline on that highway, but up in Alaska you do, don't you?

A. That's right. Your map gives you what mile-posts there are.

Q. And there is not a filling station every ten miles? A. No, it is not like it is down here.

Q. And that's why you have mile posts every few miles? A. Yes, sir.

Q. There was a map in the glove compartment of that car, wasn't there?

A. I imagine, but I couldn't be sure.

Q. Do you remember what time of day you got to the intersection of Thompson and Glenn Highway? A. No, sir, I don't.

Q. It would be somewhere around noon, wouldn't it? A. I just really don't remember.

Q. From Anchorage did you make any stops?

A. Yes, sir, I think one time to eat.

(Deposition of George A. McDonald, Jr.)

Q. Where was that?

A. Palmer, we stopped at Palmer.

Q. From there, after you left Palmer, until the time your brakes went out, did you make any other stops? A. Not that I can recall.

Q. You don't recall any others?

A. No, sir.

Q. Now when Mr. Pipkin was asking you some questions, I believe you said that after you had been at your friends' house in Anchorage, I believe you made this statement, "We decided to go to Valdez", isn't it a fact you decided to go to Valdez, I mean the final decision was made in Anchorage rather than up in Fairbanks?

A. Well, no. Actually when I said we decided to go to Valdez from Anchorage, I meant we were going to leave Anchorage there and go because it was more or less decided when we left Fairbanks that we would go down there.

Q. Were all these ladies members of the same Church?

A. We were all members of the same Church.

Q. And that's the Southern Baptist Convention?

A. Yes, sir.

Q. Now, as I understand, they were working on the road around the 57 mile post and graders had built up a pile of dirt in the middle of the road?

A. That's right.

Q. And not only dirt, it was mixed in with gravel and rock? A. That's right.

Q. And the right side of the road was under

(Deposition of George A. McDonald, Jr.)

construction and that caused you to have to go over that hump? A. That's right.

Q. Had you been over that hump more than once before your brakes went out?

A. No, sir, we hadn't.

Q. And when you did that you heard a loud noise?

A. It wasn't a scraping noise, it was a thump.

Q. It was a thump, and you felt it in your car?

A. Yes, sir.

Q. How did she come to a stop at that time?

A. Well, she put the brakes on, and it slowed down for just a second until all the fluid bled out of the line and she had to use the emergency brake.

Q. And she was only then traveling about 10 or 15 miles an hour? A. That's all.

Q. Had any of the other people in your car had occasion to test out the effect of the emergency brake to know how that affected your car?

A. No, sir.

Q. And you hadn't, and you never used the emergency brake? A. No, sir.

Q. And from that point on until the accident you never had occasion to feel the brakes or to use them or see how they were working from your own experience? A. No.

Q. And the same is true as to the other ladies?

A. That's right.

Q. So actually your mother's knowledge as to how the car was working was a little bit better than the other occupants of the car?

(Deposition of George A. McDonald, Jr.)

A. That's right.

Q. Because she was the one that was driving it and the one that was manipulating the emergency brake? A. That's right.

Q. The emergency brake in that car is really a parking brake, isn't it?

A. Yes, sir, that's about all it is good for.

Q. These ladies call it an emergency brake?

A. All it does is tighten down on the drive shaft and keep it from rolling when you are parked. It is not actually an emergency brake.

Q. You know these ladies had that impression of the brake, they thought it would stop the car?

A. Yes, sir.

Q. But you knew it didn't work the brake drums at all? A. I knew that.

Q. And you knew it didn't work a set of four wheel hydraulic brakes? A. I knew that.

Q. And you don't know whether Mrs. Aronson knew it or not? A. No.

Q. Or your mother?

A. I don't know whether my mother knew that or not.

Q. But you knew that yourself?

A. I knew how it worked.

Q. And these other ladies in there were not as familiar with the feel of that automobile or didn't have any occasion to become familiar with the way that car drove without foot brakes, but using the parking or emergency brake? A. That's right.

Q. Now after you got out, you said you came

(Deposition of George A. McDonald, Jr.)
around—first of all, I believe you said you smelled brake fluid, is that right? A. Yes, sir.

Q. And that you know how it smelled?

A. Yes, sir.

Q. I believe you answered Mr. Pipkin you were very familiar with the smell of it?

A. That's right.

Q. How are you very familiar with it?

A. Well, my daddy had a used car lot and I worked down there for him. I did some work on those cars and just minor stuff, and I was familiar with the smell of brake fluid from filling up the master cylinders and all of that on the cars out there.

Q. When you went around to look, was it dark?

A. Yes, sir, it was dark.

Q. Did you have a flashlight?

A. No, sir.

Q. Did you have a lighter or match?

A. No, sir.

Q. You had one in the car, didn't you?

A. Well, I imagine, but I didn't want to strike a match back there.

Q. Why not?

A. Because it will catch on fire.

Q. It is not as *voluble* as gasoline?

A. No, sir. I thought it was gas at first.

Q. You said you went back on the driver's side and told your mother in a low voice?

A. Well, I was just standing right there and my mother doesn't like for people to holler at her, and

(Deposition of George A. McDonald, Jr.)

in a light voice I told her what was wrong. I didn't try to hide anything from the people in the car.

Q. Did you tell your mother and subsequently did your mother tell the other people in the car?

A. No, sir, I told them myself.

Q. I thought you meant your mother told them?

A. No, I told her, and after I got back in the car they asked what was wrong and I told them, and she tried the brakes and they went to the floor.

Q. Just about like a clutch?

A. Yes, sir, just about.

Q. At that time do you remember a truck coming by and stopping?

A. Not at that time.

Q. When do you remember a truck coming by and stopping? A. I don't.

Q. You don't remember that at all?

A. No, sir.

Q. Do you remember a truck coming by in a few minutes going in the opposite direction?

A. No, sir, I don't remember that.

Q. You don't remember that?

A. No, sir.

Q. Now as to any of these conversations you said took place in the car, do you remember anything specifically Mrs. Earl Aronson said, Flo Aronson?

A. No, sir, I can't remember anything specifically.

Q. Do you remember her saying, "All right, let's go ahead", or anything at all that was said?

(Deposition of George A. McDonald, Jr.)

A. I can't remember anything definitely that any one person said, no, sir.

Q. Do you know whether Mrs. Aronson had ever driven that automobile?

A. No, sir, she hadn't that I know of.

Q. So when you say people had a discussion about it, you don't know whether Mrs. Aronson joined in the discussion or not?

A. She probably did.

Q. Do you know whether or not she did?

A. Oh, yes, sir, they all were in the discussion.

Q. Now if there was such complete agreement, why were there so many discussions?

A. Well, to make sure that everybody was satisfied.

Q. Everybody was satisfied?

A. I imagine so.

Q. If everybody expressed satisfaction, why did you have more than one discussion?

A. Well, I guess my mother figured everybody was entitled to change their mind.

Q. As a matter of fact, a few of them expressed the desire to turn around and go back, didn't they?

A. I don't know. I don't recall anybody wanting to go back.

Q. This isn't a part of the country where you would get out in the middle of the night and be safe, was it? A. That's right.

Q. Actually it is wilderness there, isn't it?

A. That's right.

Q. There are no houses around, no filling sta-

(Deposition of George A. McDonald, Jr.)

tions, and very little traffic? A. That's right.

Q. Any wild animals around?

A. Yes, sir, quite a few.

Q. What kind?

A. Bear, wolverine and moose and things like that.

Q. It is not a place—it is not like going from here to Houston, if something happens you can get out to one of these little towns, is it?

A. No, sir, it is not like that, it is wilderness.

Q. It is wilderness? A. Yes, sir, it is.

Q. Is it cold up there too?

A. Not real cold through the summer. It gets cool but not real cold.

Q. There wasn't any actual choice as to the passengers about getting out and staying in the middle of the wilderness in the middle of the night, was there?"

[The following matter is from the District Court Reporter's Transcript:]

Mr. Clasby: We object to that as calling for the conclusion of the witness and taking over the function, if anything, of the court. [52]

The Court: I think I understand the objection, but I will overrule it.

(Continued reading deposition from line 14, page 76 to line 5, page 78.)

"A. No, no one that I can recall really wanted to.

Q. I mean that's the reason for it, wasn't it, I

(Deposition of George A. McDonald, Jr.)
mean you wouldn't drive off and leave a woman out there?

A. No, they were all four sensible, and I really believe if anyone had really wanted to turn around and go back, the rest of them would have been willing rather than just making them go on.

Q. That's your belief?

A. That's right, I really believe that because I have known those women for a long time and they are very sensible.

Q. From your own knowledge up there, if a person had refused to go on and had gotten out of the car, the chances of survival would have been pretty small? A. No, sir, not necessarily.

Q. Well, it is possible?

A. If they stayed on the highway there is not much danger of the animals bothering them because the animals are as much afraid of a person as they are them.

Q. That's just your idea?

A. That's a fact, until you corner one. Well, now you take a woman, she is liable to start running any direction.

Q. There was no real choice about them getting out——

A. They could have if they wanted to.

Q. They could have and you could have left them out there?

A. Yes, sir, they could have, but we wouldn't have. If one of the women would have really wanted to turn around and go back, I mean just whole-

(Deposition of George A. McDonald, Jr.)

heartedly wanted to go back, my mother would have turned around and carried her back.

Q. You know what was inside your mother's mind?

A. I know what my mother would have done.

Q. You are not going by what anyone said?

A. No, sir, I am not going by what anyone said or nothing, I am going by what I know about my mother.

Q. State whether or not you know about any of those ladies stating——

A. Of my own knowledge they didn't.

Q. Of your own knowledge they didn't?

A. No, sir."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Johnson: It is twelve o'clock. Do you want to stop?

The Court: Very well, this case, then, will be resumed at two o'clock.

Mr. Clasby: If the Court would rather resume at 1:30, I am willing to start then.

The Court: I am reluctant to say 1:30, because I know attorneys have appointments in their offices, but I would be pleased to resume at 1:30 if you like.

Mr. Johnson: That is agreeable.

Mr. Clasby: It looked like about another hour and a half reading, so perhaps it would be three before we reach argument. It might be advisable to try 1:30.

(Deposition of George A. McDonald, Jr.)

The Court: I will be very pleased to resume at 1:30. Very well.

Mr. Johnson: Thank you, your Honor.

(Thereupon, at 12:05 p.m., a recess was taken until 1:30 p.m.)

Afternoon Session—1:30 P. M.

Clerk of Court: Court has reconvened.

The Court: Are you gentlemen ready to proceed?

Mr. Johnson: The plaintiff is ready, your Honor. [53]

Mr. Clasby: We are, your Honor.

The Court: Very well.

Mr. Johnson: Before the recess we had completed the first five lines on page 78 of the deposition, your Honor.

(Continued reading deposition of George A. McDonald, Jr., from line 5, page 78, through line 4, page 86.)

"Q. It was never mentioned?

A. It was never mentioned.

Q. And yet you had about four conversations about whether to go ahead or not?

A. That was after the accident.

Q. After the brake fluid? A. Yes, sir.

Q. Before the brake fluid went out how many conversations did you have before the accident about whether you should go ahead or not, you related several of them.

A. Maybe one or two.

(Deposition of George A. McDonald, Jr.)

Q. You related one at the times the brakes went out? A. Yes, sir.

Q. The 56 Mile Lodge and on top of the hill?

A. Yes, sir.

Q. That's three of them, and you had three conversations about whether you should go ahead or not, and yet you don't remember any of those four women expressing any dissent at all?

A. Well, they were all saying, "If you want to go, go ahead, it doesn't matter to me." That's why I say if one of them had really wholeheartedly wanted to go back, my mother would have turned around and taken them, but they were saying, "If you want to go ahead, go ahead."

Q. But they were relying——

A. On my mother's driving, that's what they were doing.

Q. And she said the emergency brakes were good?

A. The emergency brakes were good.

Q. Now Thompson Pass shows up on these maps, doesn't it? A. Uh-huh.

Q. Do you know whether or not — where is Thompson Pass?

A. Right there (indicating on the map).

Q. Well, is this true, that mountain country was encountered before you got to Thompson Pass?

A. Not particularly, no, just a few little hills.

Q. Was there fog when you got to the few little hills? A. No.

Q. There was no fog? A. No.

(Deposition of George A. McDonald, Jr.)

Q. And it wasn't often dense fog before you got there? A. No.

Q. Now when you got to the mountain pass, now did you ascend a deep mountain pass?

A. No, sir, you couldn't hardly even tell you were going up.

Q. It was very gradual?

A. It was very gradual.

Q. And when you got to the top, was it foggy or clear? A. There was fog.

Q. Was it foggy clear to the ground?

A. No, it wasn't.

Q. Was it foggy enough you could see through it with your headlights?

A. Yes, sir, it was more or less on top. It was more or less a cloud formation there on top is what it was.

Q. You couldn't see very far in front of you?

A. Not at that point, no, sir.

Q. How do you know at that point you were on top of the pass if you couldn't see?

A. Because you could see the drop down.

Q. Yet the climb was very gradual?

A. Yes, sir.

Q. You didn't notice any steep ascent?

A. No, sir, I didn't notice it myself.

Q. And the reason you didn't notice it is because it wasn't there?

A. That's more than likely right.

Q. And if you didn't notice it, there was no occasion for any of the other ladies to notice it?

(Deposition of George A. McDonald, Jr.)

A. That's right.

Q. Now at that pass is there a sign saying it is Thompson's Pass?

A. Not that I can recall.

Q. You do not know whether you had a map in your glove compartment or not?

A. No, I don't know.

Q. If you had one you see that Thompson's Pass' elevation is 2271 feet, couldn't you?

A. That's right.

Q. You would have also known that there were no roadhouses and filling stations between the 56 Mile Lodge and Valdez, is that right?

A. That's right.

Q. Yet there are back up the other way?

A. I am not sure.

Q. You are not sure? A. No.

Q. You could have found out where the closest one was, couldn't you?

A. Yeah, if we had had a map. There might have been a map in there but I sure don't know about it.

Q. Well, now actually in the operation of your car—strike that question. Where is your father?

A. He is in Houston.

Q. Is he going to Alaska next week or do you know? A. I don't know.

Q. When was the last time you conversed with him?

A. Well, let's see, it was about day before yesterday.

(Deposition of George A. McDonald, Jr.)

Q. Do you know whether he is going up there?

A. No, I don't know for sure. All he said to me was be sure and come down here.

Q. Now the times you have said you observed your mother trying to change gears, was it light or dark in the car? A. It was dark.

Q. Did you have a dome light in the car?

A. Yes, sir, a light in the ceiling.

Q. Was that on or off? A. It was off.

Q. Do you know whether at any time your mother tried to shift those gears with her foot?

A. She sure did.

Q. Could you see it?

A. No, sir, you could tell by the sound of the engine.

Q. Did you notice her doing that just in the clutch? A. Yes, sir, she did.

Q. How did you notice her do that?

A. By the sound of the engine.

Q. Is that the only way you noticed it?

A. That's right, and noticing her leg.

Q. Did you observe her leg?

A. No, but if I had looked I could have seen it.

Q. But you didn't look? A. No, sir.

Q. How fast was she going before she tried to shift gears? A. That would be hard to say.

Q. By that time she was going pretty fast?

A. Pretty fast, yes, sir.

Q. Well, the reason she couldn't shift them, she was going too fast? A. Yes, sir.

Q. The engine had gotten up too fast?

(Deposition of George A. McDonald, Jr.)

A. I imagine so.

Q. She could have shifted them if she had tried them a little earlier? A. I imagine so.

Q. And the fact that was a steep drop was obvious to you and obvious to the driver?

A. That's right.

Q. And it was also apparent to you at that time that she didn't have any brakes?

A. It was apparent long before then.

Q. When these discussions about going ahead if you want to were had, was there a statement made by your mother that the emergency brake was still working? A. Not that I can recall.

Q. You mean these people went ahead without any knowledge of the emergency brake working?

A. Well, she had to use it a couple of times and it was working, and I imagine they felt that it was.

Q. I mean you can't recall, you can't say?

A. No, that has been almost four years ago.

Q. That's the reason I am asking you about some of these questions you testified about.

A. I don't recall her actually coming out and saying these emergency brakes are good, let's go on.

Q. Actually remembering anything being said about them, you can't, about the emergency brake being good?

A. Maybe once where she said something about the emergency brake holding or something, I don't know.

Q. Now when this man—you stopped at this station and this man came out, do you remember of

(Deposition of George A. McDonald, Jr.)

your own independent knowledge that conversation?

A. Most of it, yes, sir.

Q. You remember it of your own knowledge?

A. You mean between my mother and the man?

Q. Yes, sir, you were still in the car at that time? A. I was still in the car.

Q. Everybody was in the car?

A. He was around by her side.

Q. He was by her window?

A. I imagine he thought we wanted some gas or something and he came out and asked if he could help.

Q. And you stated he stated that the road was good all the way?

A. He stated that the road was good.

Q. You don't know whether anybody else in there heard that or not?

A. I imagine they all heard it.

Q. Do you know whether or not Mrs. Aronson in the back seat heard it?

A. Oh, I am pretty sure she did.

Q. You can testify that she heard it?

A. I imagine so.

Q. You imagine so?

A. I am pretty sure she heard it, and everybody was awake.

Q. Did you give more than one statement about how this accident happened?

A. What do you mean?

Q. A written statement, somebody would come up and ask your name and how it happened and you

(Deposition of George A. McDonald, Jr.)

would tell them all you knew about it and signed it at the bottom. A. I gave one.

Q. You have only given one?

A. Yes, sir."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Johnson: If the Court please, the next question and answer is objected to on the ground that it is incompetent, irrelevant and immaterial.

Mr. Clasby: We concede that it shouldn't be in the record.

The Court: Very well.

(Continued reading deposition from line 7, page 86, through the last line on page 86.)

* * * * *

"Q. Some representative at Fairbanks, is that right?

A. Yes, sir. That was right after I got out of the hospital.

Q. Was that on or about September 11, 1953?

A. Yes, sir.

Q. And you were then a student at the Fairbanks High School? A. That's right.

Q. That was to have been your freshman year and "I have been in the hospital now and can't start until the second half," is that what you told him? A. Yes, sir.

Q. Was that correct? A. That's right.

Q. Now did you tell him that you didn't remember whether there was any vehicle that caused you

(Deposition of George A. McDonald, Jr.)
to get on the other side of this center pile of dirt or it was because of the holes on the other side, that you just didn't remember why you crossed?"

[The following matter is from the District Court Reporter's Transcript:]

Mr. Clasby: If the Court please, we object to this line of questioning as an attempt to impeach their own witness. This comes as one of the peculiarities when the party proposing the deposition does not introduce it, but having introduced the deposition proposed by us they make this witness their own and according to the rules of practice, they should not be permitted to impeach their own witness.

Mr. Johnson: I believe, your Honor, under our own rules and statutes, as I recall it, it is just like calling another party, that you certainly have the right to impeach and even your own witness you can impeach if it becomes necessary.

The Court: Only under certain circumstances can you impeach [54] your own witness, but I will overrule the objection.

Mr. Clasby: May I have, without noting it in the record, a continuing objection to the examination on that particular point? I think there are several pages on it that run along the same line.

The Court: Perhaps you should interpose the objection.

Mr. Clasby: All right.

The Court: I don't know what is coming, of course, but I think you had better interpose your objections as we go along, until such time as it

(Deposition of George A. McDonald, Jr.)

seems apparent that a standing objection may be taken.

Mr. Clasby: All right.

(Continued reading deposition from line 1, page 87 through line 8, page 87.)

"A. So far as I remember, it was because of the holes.

Q. I am asking you if you remember if you told him why you went over there?

A. No, I don't remember if I told him that or not.

Q. Did you tell him you were stopped there just a couple of minutes when a truck came by going in the opposite direction?"

[The following matter is from the District Court Reporter's Transcript:]

Mr. Clasby: Same objection.

The Court: Same ruling.

(Continued reading deposition from line 9, page 87 through line 4, page 89.)

"A. Not that I recall.

Q. You don't remember whether you did that or not?

A. I don't remember a truck coming by.

Q. I am asking you if you remember what you told him? A. No, I don't.

Q. This statement was taken approximately 30 or 40 days following the accident?

A. That's right.

Q. And your memory about it was better than it is now? A. That's right.

(Deposition of George A. McDonald, Jr.)

Q. You were not under drugs or ether or anything like that? A. That's right.

Q. Did he come to your house?

A. We were living in the Northwood Building, daddy and I, and he came there.

Q. He came to your house? A. Yes, sir.

Q. And you gave him a statement?

A. Yes, sir, I gave him a statement.

Q. Did you read it over before you signed it?

A. No, I didn't. My daddy did.

Q. Your daddy did. Well, did he come with a statement already prepared or did he come out there and talk to you first?

A. I don't know how he did it.

Q. Well, he did talk to you some little time and typed up the statement and asked that it be signed, is that right? A. That's right.

Q. Did you tell him that after your brakes—you learned that your brakes went out that you went on and came to a place on the left hand side of the road which was a bar and eating place, is that true?

A. That's right.

Q. I will ask you to speak up, she can't hear you. A. That's right.

Q. "And a man came out just as we drove up," did you tell him that? A. Yes, sir.

Q. Is that true? A. That's right.

Q. Did you tell him someone talked to him but I don't remember what he said?"

[The following matter is from the District Court Reporter's Transcript:]

(Deposition of George A. McDonald, Jr.)

Mr. Clasby: The same objection.

The Court: Yes, overruled.

(Continued reading deposition from line 5, page 89, through line 25, page 90.)

"A. No, I know what he said.

Q. You know what he said?

A. That's right.

Q. But you didn't know on September 11th what he said?

A. No, I didn't tell him I didn't know.

Q. Who was there when this statement was taken, was your daddy there? A. Yes, sir.

Q. And he read it over and he was present the whole time this man was there? A. Yes, sir.

Q. And you weren't forced to make any statement? A. No, sir.

Q. And if it wasn't correct, your father would have stopped him?

A. Well, my father wasn't at the wreck.

Q. And because your father was there, you weren't forced to sign anything, were you?

A. No, but I didn't read it.

Q. You didn't read it, was it read to you?

A. No, my daddy read it.

Q. It wasn't read to you and you didn't read it?

A. He was sitting there while I made the statement, and after it was typed up my daddy read it to make sure it was worded the way that I said it, and he told me to sign it.

Q. Then your father was present and listened all the time that you and this representative talked,

(Deposition of George A. McDonald, Jr.)

is that right? A. That's right.

Q. And he heard the whole conversation?

A. That's right.

Q. And he read it over before you were to sign it? A. That's right.

Q. And the reason that he read it over is that he told you to make sure that it coincided with what you had said in your father's presence?

A. That's right.

Q. And then he told you to sign it?

A. That's right.

Q. You had every opportunity to read it?

A. It wouldn't have done me any good. I didn't know anything about what he was writing anyway.

Q. You mean——

A. I don't know—every time someone writes up something like that they seem to change it around some."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Johnson: Now, if the Court please, the next two questions and answers are objected to on the ground that they are incompetent, irrelevant and immaterial. [55]

Mr. Clasby: We agree that should be eliminated as being improper.

The Court: Very well, that shall be omitted.

(Continued reading deposition at line 8, page 91, through line 1, page 96.)

* * * * *

Q. How long was your father there, was he

(Deposition of George A. McDonald, Jr.)

there about five minutes or was he there an hour?

A. It was about an hour.

Q. And you and the representative were there all at the same time with your father, all in one room? A. Yes, sir.

Q. And your father listened to his questions and your answers? A. That's right.

Q. I want to make sure you understand you are under oath, and you still state you haven't read that statement before you signed it?

A. I haven't read that statement.

Q. Do you know whether or not your father's deposition in this case has been taken?

A. No, I don't.

Q. Did you go over this statement this morning before I got here with Mr. Pipkin?

A. A little bit.

Q. A little bit? A. Yes, sir.

Q. What do you mean by a little bit?

A. Oh, we talked about it.

Q. You talked about it, is that when you first told anybody that you hadn't signed this before you read it?

A. No, I didn't say anything about that.

Q. You didn't tell anybody that?

A. No, sir.

Q. Didn't Mr. Pipkin ask you whether you had read this statement?

A. Not that I recall.

Q. Did he let you read it in his office?

A. No.

(Deposition of George A. McDonald, Jr.)

Q. Did you ask to? A. No, sir.

Q. What did you talk about?

A. The same thing we have talked about here.

Q. Did you talk about the statement you have given?

A. No, we just went over some of the facts and I showed him the place on the map, that was all.

Q. Did you read anybody else's statement?

A. No, sir.

Q. Did you read anything while you were in Mr. Pipkin's office?

A. I haven't read nothing, not one thing.

Q. Did you tell him you had made a statement?

A. I believe so.

Q. You told him that?

A. I believe it was brought out that I had made a statement.

Q. And did you tell him at that time that statement you never had read it, and couldn't tell him what was in it? A. No, sir.

Q. You never have told him that?

A. I sure didn't.

Q. But this statement is not correct, "Someone talked to me and I don't remember what he said"?

A. He took a statement from me and also took a statement from Mrs. Dickerson.

Q. I don't have Mrs. Dickerson's statement, I don't represent her.

A. He fouled it up somewhere.

Q. You know he fouled it up but you don't know how because you never read it?

(Deposition of George A. McDonald, Jr.)

A. That's right.

Q. That day to this have you ever read that statement? A. I haven't even seen it.

Q. You haven't even seen it? A. No.

Q. And you didn't read it that day?

A. No, I haven't seen it.

Q. And yet you are willing to testify that statement was not correct? A. I would.

Q. Let's see if I understand you and you understand me, you talked to this investigator and representative at your home in the presence of your father? A. That's right.

Q. And he then took out a typewriter and wrote a statement, do you remember whether it was one or two pages long? A. No, I don't.

Q. But you didn't read it? A. No, sir.

Q. And you haven't read it in the two or three years that have elapsed since then?

A. No, sir.

Q. And yet you are willing to swear under oath here today that that statement is wrong?

A. According to that.

Q. Are you——

Mr. Pipkin: Let him answer.

A. According to that last question you asked me, that statement is wrong, unless I misunderstood it, and I don't believe I did.

Q. Are you willing to swear then that that statement is wrong?

A. Yes, sir, on some of it, but I sure don't remember any truck coming up there, and I don't re-

(Deposition of George A. McDonald, Jr.)

member telling him that one did or anything like that.

Q. Actually you are on leave now, you are not on any orders to go anywhere?

A. I am on traveling orders.

Q. Traveling orders? A. Yes, sir.

Q. Where do you have to be?

A. I have to report to Loring Air Force Base in Limestone, Maine the 22nd of October.

Q. The 22nd of October, that's 18 days from now?

A. That's right, but I have to have plenty of time in case something happens.

Q. Did you tell him this, did you tell him that after you left the roadhouse that your mother drove slowly? A. Yes, sir.

Q. Is that true?

A. Yes, sir, she did drive slow.

Q. Did you tell him that the gear lever was in the down position? A. Yes, sir.

Q. Is that true?

A. That's true."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Clasby: If the Court please, I would like to have it understood that our objection is to the last couple of questions and the next several pages. It is the same type of attempted impeachment.

The Court: Very well.

(Continued reading deposition from line 2,

(Deposition of George A. McDonald, Jr.)

page 96, through to the end of the deposition, page 131.)

"Q. Did you say, "I don't remember how far we drove before we started down the hill?"

A. That's right.

Q. Is that true? A. That's true.

Q. Do you remember saying, "I do remember mother trying to shift into the lower range"?

A. That's right.

Q. Is that true? A. That's true.

Q. Did you tell him, "I heard the noise of gears," is that true? A. That's right.

Q. Did you say, "I believe she had the headlights on"?

A. I didn't say I believe she had the headlights on because I knew she had the headlights on.

Q. Is that true? A. That's true.

Q. Did you say, "It was getting pretty dark"?

A. No, sir, I didn't say it was getting pretty dark because it was dark, and I am pretty sure I told him it was.

Q. Well, was it dark when the brakes went out or was it still light?

A. It was fairly dark.

Q. Did you tell him, "I recall we went up in the hills a bit and it was foggy on the hill"?

A. That's right.

Q. Is that true?

A. That's true, referring to the summit.

Q. Did you say the fog extended clear down to the road? A. That's right.

(Deposition of George A. McDonald, Jr.)

Q. Is that true? A. True.

Q. Did you tell him, "I couldn't judge how far into the fog we could see"? A. That's right.

A. Is that true? A. That's true.

Q. Did you tell him, "I have no recollection of stopping after our stop at the roadhouse"?

A. No, I don't remember telling him that.

Q. Is that true?

A. You mean did I tell him that?

Q. Is it a true statement that, "I have no recollection of stopping after we stopped at the roadhouse"?

A. No, sir, because I have a recollection of it.

Q. In other words, now you have a recollection of it? A. I did then.

Q. You don't know where he got the idea for this statement? A. No, I don't.

Q. But all the other things I read in there are true?

A. They are true because we did stop.

Q. But that one thing is not true?

A. That's right.

Q. Did you tell him, "After starting down the fog decreased"? A. That's right.

Q. Is that true? A. That's true.

Q. Did you tell him, "Mother saw we were picking up too much speed, I believe she set the emergency brake"? A. She did.

Q. And that's true? A. That's true.

Q. Did you say, "I don't know if it slowed the car down at all"? A. That's true.

(Deposition of George A. McDonald, Jr.)

Q. "I just don't remember much about anything connected with the case from here on until after I had reached medical care"? A. That's right.

Q. From the time you started down there you just didn't remember anything?

A. Well, I can remember up until the time we turned over.

Q. Then your mind is blank until the time you starting getting some medical care?

A. That's right.

Q. So that part all is true?

A. That's right.

Q. Is this part true, "When we stopped at the roadhouse, I don't have any recollection about anyone in the car expressing any concern about continuing on without the brakes?" A. No, sir.

Q. That's true? A. That's true.

Q. Did you say, "I just don't have any recollection of that point nor do I remember when she stopped at the roadhouse that any discussion was had as to whether we should stop or to continue on," you just don't remember whether there was any conversation had at that point?

A. Well, there was.

Q. So that part is not true? A. That's right.

Q. Other than that statement and your talking to Mr. Pipkin this morning, you haven't discussed this with anybody else? A. No, sir.

Q. From July 31st, 1953 until October 4th, 1956? A. Oh, people have asked me——

(Deposition of George A. McDonald, Jr.)

Q. I mean in detail. You said you were in an accident, I can understand that.

A. I mean it hasn't been in detail, no.

Q. About how it happened and the facts that led up to it. A. No.

Q. You have no independent recollection of Mrs. Aronson, as to whether she ever expressed any desire that you turn around and go back?

A. I don't have any recollection of that whatsoever, as to her actually coming out and saying go back, I don't.

Q. You don't have any recollection on that one way or the other? A. No, I don't.

Q. Do you have any recollection of Mrs. Aronson's statement one way or the other that you should wait until the next day?

A. No, I don't have any recollection on that either.

Q. She was in the back, I believe?

A. Yes, sir.

Q. Along with Mrs. Hall?

A. No, Mrs. Dickerson and Mrs. Aronson were in the back.

Q. So the surviving person that was sitting closest to Mrs. Aronson is Mrs. Dickerson?

A. That's right.

Q. Had your mother ever traveled these highways in Alaska before this trip?

A. You mean those particular highways?

Q. Well, any degree of Alaskan travel at all?

A. Not by herself.

(Deposition of George A. McDonald, Jr.)

Q. As a driver? A. No.

Q. She had not? A. No.

Q. Yet you told Mr. Pipkin that she was an experienced, good driver?

A. She was a good driver.

Q. But she never had been on these Alaskan roads by herself before or as a driver? A. No.

Q. You have no independent recollection that you can actually testify to whether or not Mrs. Dickerson made any request that the damage be repaired or that the whole party turn around and go back to Fairbanks?

A. No, I don't remember anything about that.

Q. How long had you been living in Alaska before this accident happened? A. Since 1951.

Q. Since 1951, your mother had been up there all that time? A. Yes, sir.

Q. And she had never driven these highways herself or actually driven over them?

A. No, because each time we had been out my daddy was with her.

Q. Had any of these ladies with you ever made any of these trips before with them?

A. Mrs. Aronson had been over the Alcan Highway with us before.

Q. Isn't that any one of these?

A. No, sir, it didn't have anything to do with these.

Q. At the time they had gone over that highway, your father was driving? A. That's right.

(Deposition of George A. McDonald, Jr.)

Q. And you say at the top of Thompson's Pass that the car stopped and a discussion was had?

A. That's right, sir.

Q. You remember it? A. I remember it.

Q. Everybody else in the car that survived, that is, Mrs. Dickerson, she should also remember it?

A. She should also remember it.

Q. And the reason it sticks in your mind, you had a prayer meeting at that time?

A. That's right.

Q. And you stayed there five minutes?

A. Approximately that time.

Q. Five or ten minutes, that's your best recollection? A. That's my best recollection.

Q. And again a further discussion was had?

A. Yes, sir.

Q. And it is your testimony under oath that Mrs. Dickerson and Mrs. Aronson said go ahead?

A. So far as I remember, yes, because——

Q. Your memory——

Mr. Pipkin: Let him finish his answer.

Q. (By Mr. Cobb): You said so far as you remember because.

A. Well, it has just been so long, you can't remember just word for word.

Q. You can't swear word for word whether or not Mrs. Dickerson or Mrs. Aronson asked to turn around. A. That's right.

Q. And the same is true at the filling station back up there? A. That's right.

Q. It was the family automobile?

(Deposition of George A. McDonald, Jr.)

A. Yes, sir.

Q. Is your father also a Baptist?

A. Yes, sir.

Q. Was it his idea that you go to this revival, would he like to go?

A. I don't know if he knew anything about it or not.

Q. Well, the trip, was that at his—I mean he certainly knew about it?

A. Yes, sir, he approved of it, I mean he was willing.

Q. It wasn't any secret? A. Oh, no.

Q. How long have you had a driver's license?

A. About two years, I guess about two years.

Q. About two years?

A. Something like that.

Q. The balance of the highway was blacktop except this portion that was being repaired?

A. That's right, we had blacktop all the way on that trip except that one stretch in there.

Q. A two lane? A. Yes, sir, a two lane.

Q. What is the effect of a car going down a hill when you put it into a lower gear, what effect does it have on the car?

A. It slows it down, your engine runs up to a higher rpm. What it does, it pulls back on your engine.

Q. Your wheels will go around slower?

A. That's right.

Q. It will have a braking effect?

A. That's right.

(Deposition of George A. McDonald, Jr.)

Q. Was there anything to have prevented your mother to have started down that hill in low gear?

A. Nothing that would have stopped her.

Q. That's right.

A. No, and I really don't know why she didn't.

Q. You don't know?

A. No, sir, I really don't know because I could see and everybody else could see it was a steep hill, but maybe she thought the emergency brake would hold, but why she didn't gear it down up there; I don't know.

Q. You might have made it if she had?

A. Might have.

Q. That was the last opportunity you had?

A. That's right, that we the last time I said anything to her.

Q. Did you ask her to put it in low gear?

A. No. I mean up there on the summit was the last time I said anything to her.

Q. And that was the last opportunity that anybody had in going down that hill to change the method of operation?

A. That's right. Maybe she figured after we got started down, if the car did get to going too fast that she could get it in low gear.

Q. She actually wasn't experienced in that hilly country?

A. No, sir, she wasn't experienced in driving those mountains.

Q. These other people didn't know she wasn't experienced, did they?

(Deposition of George A. McDonald, Jr.)

A. Well, I don't think any of them were.

Q. And they were relying on her?

A. That's right.

Q. Especially that last defense, they were relying on her? A. That's right.

Q. She was the one that actually had control of the car and had had those last 30 minutes?

A. Yes, sir, that's right.

Q. So actually these decisions that were made, they were relying on her knowledge?

A. That's right.

Q. It was pretty apparent to you and should have been to your mother as you went down that hill her low gear would have been a wiser course or a safer course?

A. That's true, but you know how these mothers are, when they get in a tight place like that they don't want to take the advice of a kid.

Q. Well, you didn't say anything about what you thought would have been the safer course?

A. No, sir, that's right. If she had geared down on top of the hill before she got up top speed and used the emergency brake we would have made it.

Q. And you had that last opportunity on the top of the hill?

A. Yes, sir, we had the opportunity to do it.

Q. You have understood my questions?

A. Yes, sir.

Q. And you have answered them truthfully?

A. Yes, sir, I have answered them truthfully and to the best of my knowledge.

(Deposition of George A. McDonald, Jr.)

Q. Pass the witness.

Redirect Examination

Q. (By Mr. Pipkin): How about this statement, did the man sit there and write it down?

A. He wrote it down, yes, sir.

Q. Was it typewritten when it got back to you or hand written?

A. I don't remember whether it was typed or hand written, but I remember that my daddy read it and I signed it.

Q. How long did you continue under medical care after this statement was made?

A. Up until about November or December of 1953.

Q. And this happened in July? A. Yes, sir.

Q. Were you at home in bed when he came to take it?

A. Yes, sir—well, I was in a cast and in a wheel chair.

Q. What kind of a cast?

A. Well, it completely covered my foot and my leg and came up around my waist.

Q. Did you have some broken bones besides your head, your skull fracture?

A. My right leg was broken.

Q. Your right leg was broken and you were in a cast, in a wheel chair? A. Yes, sir.

Q. Was your father there all the time he was talking to you? A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. Now you say you didn't read the statement before you signed it? A. No.

Q. And you never have read the statement since you signed it, no time, nowhere? A. No, sir.

Q. It never has been read to you except when he was asking you these questions?

A. It never has been read to me except when he was asking me these questions.

Q. Has he shown you any statement that you signed with your signature on it? A. No, sir.

Q. In talking to you, this counsel here hasn't shown you any statement? A. No, sir.

Q. That you signed? A. None whatsoever.

Q. Have you been afforded any opportunity during this deposition to read this statement over to see what was in it?

A. I imagine I could have.

Q. I say have you been afforded any opportunity to read a statement signed by you with your signature? A. No.

Q. You were acquainted with Mrs. Aronson?

A. That's right.

Q. And knew her when you saw her?

A. That's right.

Q. How long have you been acquainted with her?

A. For about three years.

Q. Do you know whether she drove a car some?

A. She drove her husband's car some.

Q. Did she live in Fairbanks or not?

A. Yes, sir, she lived in Fairbanks.

Q. You say she had been out in the car with

(Deposition of George A. McDonald, Jr.)

your mother and father? A. Yes, sir.

Q. Is that the Alcan Highway? A. Yes, sir.

Q. Is that mountainous?

A. It is very mountainous, and most all inclines are steep.

Q. During all this time did you ever hear Mrs. Aronson, yourself, make any statement about whether you should go forward or not?

A. No, not definite—I mean just come right out and make the statement.

Q. I will ask it this way, did you ever hear anybody in the car give any concern about—I mean in the sense that—you don't remember any exact words or conversation after this long time, do you?

A. No.

Q. Do you remember anything she said about wanting to go on, to stop or to go back?

Mr. Cobb: I object to that as leading.

Q. All right, answer it.

A. No, I don't remember any such thing.

Q. Now was the conversation in the car at the time you got out and looked at the puddle to see that you had no brakes, that the brake fluid was out? A. The conversation was in the car.

Q. Now, you say when you got down there to this man's place, you stopped, you say you stopped at a Bar, at a roadside place, what point was that?

A. That was 56 Miles.

Q. That's the only place you stopped before you got to the Pass?

A. That's right, as far as I can remember.

(Deposition of George A. McDonald, Jr.)

Q. Now——

A. I mean to try to get the brakes fixed that was the only place we stopped.

Q. That was the only place you stopped, when you got to the intersecting road, something up there, I believe you said you stopped?

A. We stopped, yes, sir.

Q. Any houses or garages or anything there?

A. No, sir.

Q. Just wilderness, as you told the counsel here?

A. That's right.

Q. Was that a lodging place there at 56-Mile Post, where that man came out I am talking about?

A. Not that I recall. I believe it was just a bar and a place to eat.

Q. Any houses there or anything?

A. No, sir, I don't believe there were.

Q. How much education have you had?

A. I went through the eleventh grade.

Q. Did you hear any statement at the Pass or anywhere else by anyone inside the car, or were there any statements made in your presence and hearing as to whether or not it might be dangerous to make that descent without the foot brake?

A. Yes, sir, there was something said about that.

Q. Do you recall who said it?

A. No, I don't.

Q. Did you get out and walk around that Pass, at the Pass point, McDonald?

A. No, no one got out.

(Deposition of George A. McDonald, Jr.)

Q. No one got out. State the facts whether or not it was discussed in the car that the descent was shallow or deep as to the mountains or road ahead of you?

A. You mean whether there was any statement made or not as to the grade?

Q. Yes, sir, as to whether or not there was a grade.

A. Well, I can't recall, I mean not any definite words or anything, but I imagine there was something said about it being pretty steep in the conversation, but I mean I just can't really recall.

Q. We are not asking you to recall word for word conversations that far back, the effect of the conversation is about all you would be expected to remember. I am asking you did anyone there say, "Let's go back" or "Let's stop"——

Mr. Cobb: That's leading and suggestive, and I object to it on that ground.

Q. Did anyone say they wanted to go forward or you ought to go forward?

Mr. Cobb: That's leading and suggestive, and I object to it on that ground.

Q. State whether or not in your presence and hearing there was anything said in the car by anyone to the effect as to whether or not you should go forward or remain where you were or go back, any of the three? A. No.

Mr. Cobb: I object to that on the same ground.

Q. You have stated in answer to that question

(Deposition of George A. McDonald, Jr.)

that no one said anything about whether you should go forward or not?

A. Well, no—I mean they just talked about—well, I imagine they said—I am pretty sure that something was said about whether they should go on or go back or not and that's when they talked about it.

Q. Do you remember who did the talking?

A. All of them.

Q. Everybody entered into the discussion?

A. Everybody.

Q. Did that include Mrs. Aronson or not?

A. Mrs. Aronson and all.

Q. Can you state where or not she gave her consent or dissent about going, continuing?

A. No, I can't, I can't make any statement on that because——

Q. Do these——

Mr. Cobb: Let him finish his answer.

A. Because I don't recall anything definitely that she or anyone said, but I do state they entered into the discussion.

Q. Can you state here what was the outcome of the discussion as to their attitude, if they expressed any attitude? A. Yes, sir.

Q. What was it? A. To go on.

Q. Are you purporting to say here that your mother made that decision as to whether to go down the mountain from Thompson Pass?

A. No, it wasn't her decision. Everyone decided on it.

Q. Did you enter into the decision?

(Deposition of George A. McDonald, Jr.)

A. No, I was keeping quiet.

Q. What was your decision about it?

A. It really didn't matter to me, I mean it was really up to them.

Q. State whether or not to you sitting there, was there any apparent concern about whether you should go on down it or not?

Mr. Cobb: That's leading and suggestive.

Q. Let him answer it.

A. You mean what I felt?

Q. I mean was it apparent to you as to the group in the car as to whether there was any apprehension or fear about going down the mountain?

Mr. Cobb: The same objection.

A. Yes, sir, there was a fear in going down.

Q. What was the reason for that?

A. No brakes, no foot brakes.

Q. State whether or not there was any discussion as to that?

A. Well, my mother made the statement that the emergency brake was good, I imagine. I mean she had used the emergency brake before and it was good. It was a good emergency brake, and you can gear a car down and use your emergency brake like that and it will slow you down, and I imagine it was on.

Q. Did you hear Mrs. Aronson say she wanted to get out and rather not go on down?

A. No, sir.

Q. Were you present and could hear everyone in the car? A. I was sitting right there in the car.

Q. Were you wide awake or asleep?

(Deposition of George A. McDonald, Jr.)

A. We were all wide awake.

Q. When sitting upon the Pass with your lights how far would you say you see down the road ahead of you?

A. I would be afraid to say because I don't know. I would say maybe fifty to one hundred feet.

Q. Is it your statement or not you had ever been over that road before?

A. I had never been on that road before.

Q. Now back there I think you took a turn there on your testimony that I didn't understand and I got a little confused back there, you were talking about the time you heard the noise under the car, the section of the road before you reached this Lodge, Mile Post 57 or 56, whichever it was, I am referring to the time you heard the noise that the car was stopped——

A. We heard the noise just as my mother straddled the pile of dirt, and when we heard the thump she pulled right on off, and I asked her to stop to see if it punctured the gas tank.

Q. How far did she drive after you heard the thump? A. Not over two hundred feet.

Q. Which side of the road were you on when you stopped? A. On the left.

Q. And that is when you got out—is that when you got out?

A. Yes, sir, as soon as she stopped I got out and went around back of the car and looked.

Q. How long did the car remain stopped at that point?

(Deposition of George A. McDonald, Jr.)

A. Anywhere from five to ten minutes.

Q. Had you gone to Church down there at Seward? A. No.

Q. Did you go to Church any time from the time you left Fairbanks at all, did you go to any of the Church services anywhere?

A. Not that I can recall.

Q. Not that you can recall; at what speed do you estimate the car was driven from the time of hearing the thump under the car until you got down to the 56-Mile Post, that is, the Lodge?

A. I would say about thirty.

Q. About thirty?

A. Thirty to forty, something like that, slow. We drove slow.

Q. Do you have any recollection of anyone saying that they were afraid and wanted to go back or stop and get out, any of those three?

Mr. Cobb: I object, it is leading and suggestive.

A. No, sir, I don't.

Q. You do not have any such recollection?

A. No.

Q. When your car left Fairbanks, what was your understanding as to where you were going?

A. That we were going to Anchorage and see this Poe Hamilton and go by Valdez to that Revival. That's the way I understood it to be.

Q. Did you get out anywhere on the way to Anchorage to look at the scenery or any mountain views?

A. Not that I can recall.

(Deposition of George A. McDonald, Jr.)

Q. Was any discussion had about the scenery out from Anchorage? A. About the scenery?

Q. As you went along, as to whether there was any spectacular scenery to be seen?

A. Just some glaciers.

Q. Where were they? A. All over.

Q. Was that a vacation trip you all were on?

A. More or less, and we were going to see Miss Hamilton and to the Revival.

Q. Who bought the gasoline?

A. They all put in together.

Q. How do you mean all put in together?

A. Just like a pool, when they bought gasoline they would all pay for it.

Q. Do you remember how many places you gassed up? A. No, sir, I don't.

Q. Well, how would they go about making this pool up, pass the hat?

A. Well, so to speak, yes, sir.

Q. I don't mean that literally, I mean would they just see how much it was?

A. When they would find out how much it was, they would all put in so much money and pay for it. There was four of them and it was a lot cheaper that way.

Q. Who paid at the motel?

A. All of them. They paid their own share for the room.

Q. Do you know what you mean when you go Dutch?

(Deposition of George A. McDonald, Jr.)

A. That's what they were, going Dutch, each one paying his own way.

Q. State whether or not there was any understanding about who would defray the expenses of this trip when you left Fairbanks, was any discussion had in your presence about it?

A. Not in my presence, no.

Q. Was there one of these Baptist Churches in Anchorage, do you know?

A. Yes, sir, there was a First Baptist Church in Anchorage?

Q. Were you there at any time when you could have made the services, say at night anytime?

A. I don't believe so. I don't remember, really.

Q. But your recollection is you didn't make any Church service at all? A. That's right.

Q. Although you never reached Valdez?

A. That's right.

Q. Did anyone along the way—do you recall whether anyone made any suggestions to your mother about how to drive or where to drive?

A. Not that I can recall.

Q. Now counsel asked you a number of things about what might have happened or what could have happened in your judgment, if your car had had foot brakes this accident would not have happened either, that is, you control a car like that on a road like that with foot brakes if there is any fluid in the line?

A. Absolutely. It definitely would not have happened if we had foot brakes.

(Deposition of George A. McDonald, Jr.)

Q. These curves, did they go around the mountain sharply or did they turn slightly and go down?

A. No, just weave.

Q. Just weave, were they sharp enough you couldn't see across down in the road ahead of you or what are the facts?

A. Some of them would go around the side of the mountain where you couldn't see around them and some of them would go straight down and you could see around the curve.

Q. How far were you actually down the mountain before you had the accident?

A. I would say about three miles.

Q. During that time state what action your mother took in regard to the operation of driving the car.

A. Well, she would keep it on her side of the road as much as possible, and when she would hit a curve she would take the middle or the inside of the curve and go on around.

Q. You hadn't driven much up until that time, had you? A. Not too much, no, sir.

Q. Looking back on it now and the observation you made at that time, and based on the experience you have had in driving, did she drive skillfully down the road? A. Yes, sir, she did.

Mr. Cobb: That is objected to on the grounds it is leading and suggestive.

Q. How did she drive down the mountain?

Mr. Cobb: The same objection.

A. As carefully as she could at that time.

(Deposition of George A. McDonald, Jr.)

Q. Did she have both hands on the wheel?

A. Yes, sir.

Q. Was she hysterical?

A. No, sir, she kept her head.

Q. Do you recall whether anyone was making any suggestions to her or not about what she should do in this emergency?

A. No, they were all too scared. In considering what it was, my mother drove very sensibly going down that mountain because you take someone that is an experienced driver on mountains like that and something like that happens, nine out of ten of them will go to pieces.

Q. Do you recall whether or not she held onto the steering wheel or turned it loose or anything?

A. She held onto that thing all the way down.

Q. Was there any way going over that road—do you recall the outline of the road pretty well in your mind from Thompson Pass down?

A. Pretty fair.

Q. And you have stated, I believe, if I am not correct me, state whether or not it is within your knowledge your mother had ever driven this particular Pass? A. No, sir, she had not.

Q. She had never driven it? A. No, sir.

Q. Did you hear anyone make any statement in the car as to whether or not they had ever been to Valdez?

A. I am pretty sure none of them had.

Q. None of them had?

A. No, Mr. and Mrs. Dickerson had gone down

(Deposition of George A. McDonald, Jr.)

there for a Church meeting or something but I don't believe the others had.

Q. You have made the statement here that if your car had been put in low gear she could have probably controlled it better or words to that effect?

A. That's right.

Q. How far down the road would that become apparent, in other words, could you see the road down ahead as to how steep it was getting, very far beyond your lights? A. Yes, sir, you could.

Q. How, in the darkness?

A. You mean how far?

Q. Yeah.

A. Oh, I don't know, maybe two hundred feet, something like that.

Q. That's within the range of your headlights you mean?

A. Yes, sir, within the range of the lights.

Q. Was the car in gear when it started down the hill?

A. She had it in the down position, in third gear.

Q. It was in position? A. Yes.

Q. State whether or not she made any attempt to use her hand brake?

A. Yes, sir, she did. She set the hand brake.

Q. Before starting down?

A. No, after starting, after she picked up some speed.

Q. Did you observe whether or not the hand brake was holding? A. No, it did not hold.

(Deposition of George A. McDonald, Jr.)

Q. When was it with reference to the time she put the hand brake on that she attempted to change the gears?

A. She pulled the hand brake up and tried to set the gear.

Q. State whether or not the car ever took any gear or not after that? A. No, it did not.

Q. Well, I believe that's all.

Recross Examination

Q. (By Mr. Cobb): Let me get a couple of things straight in my own mind. I know it is getting late and it is longer than you thought but we will get it over in a minute if you will just bear with us. As I understand, it is your testimony you stopped at the top of this Pass, before you went over it, and why did you stop at the top?

A. Because we saw that it was a drop from there on.

Q. That was apparent to your mother?

A. Yes, sir, it was apparent and so she stopped there and had the prayer meeting, and I don't know any definite words that were said, but they did discuss as to whether to go on or not.

Q. I was asking you as to the question whether it was apparent as to it being steep? A. Yes.

Q. And up to that point, except the thirty minutes, your mother had done all the driving?

A. Yes, sir, and the thirty minutes I drove was right outside of Anchorage and it was broad daylight.

(Deposition of George A. McDonald, Jr.)

Q. She was supposed to do all the driving?

A. Well, I imagine she was but I doubt if it was understood like that between her and my daddy though.

Q. Neither so far as her and the other people in the car? A. That's right.

Q. And she wasn't supposed to follow their suggestions or anything like that? A. That's right.

Q. She was the one in control of the car?

A. She was the one in control of the car and had charge.

Q. When you started off the steep hill it was apparent to you and your mother and everybody there that it was a steep hill? A. That's right.

Q. And you say you first noticed the gear in third position but she put it in low to start it off and then first? A. No.

Q. You can start off in high?

A. On that type of transmission you can start off on third gear and let off the clutch and it will change into fourth.

Q. From a flat standing still?

A. From a flat standing still.

Q. Your mother had driven that car many times before? A. Yes, sir.

Q. She knew how the gears were? A. Yes.

Q. There was nothing to have prevented her to have started off in low gear?

A. Nothing whatsoever to prevent it.

Q. And nothing to prevent her to start off with a combination of low gear and no brakes?

(Deposition of George A. McDonald, Jr.)

A. Nothing in the world.

Q. I am talking about this decision when they decided to go ahead, nobody was telling your mother how to drive at that point? A. No, sir.

Q. But whether to go ahead with or without the foot brakes? A. That's right.

Q. That's all the decision was about?

A. Yes, sir. They were trying to decide whether to try to make it down the hill without the foot brakes or not.

Q. But nobody made the decision but your mother whether to go down in third gear or low gear? A. That's right.

Q. That was her decision? A. That's right.

Q. And nobody attempted to exercise any control over her? A. That's right.

Q. And Mrs. Aronson and Mrs. Dickerson were in the back seat? A. That's right.

Q. And it was apparent at that point you were going down a steep hill, and if you had thought about it you would have realized you had to get it in low gear even before you started? A. Yes, sir.

Q. And if you had stopped to think about it, it would have been apparent you should have started out with the hand brake set, is that right?

A. That's right.

Q. And the only reason you think your mother didn't do it, she overlooked it or just didn't think?

A. Probably scared and just didn't think.

Q. But she didn't have any discussion with these

(Deposition of George A. McDonald, Jr.)
other ladies at that point as to how she was going to proceed down that steep hill? A. No.

Q. Although they may have been aware of the fact it was a steep hill and aware of no foot brakes, they weren't aware of how she was going to proceed down that hill? A. That's right.

Q. Mr. Pipkin asked you based on your experience now in driving and your remembrance and recollection of what happened on that occasion, had she started down this hill in first gear and the hand brake set she probably could have made it?

A. She would have made it I am pretty sure because I have driven several cars with the same transmission setup and everything. In fact, I owned one until a couple of weeks ago the same way.

Q. Did you drive it over mountains?

A. Yes, sir.

Q. When making a descent did you shift it up?

A. I had one that bad at Pala Duro Canyon at Amarillo. I had about a mile or two mile hill to get to the bottom of the canyon and I geared it down going down. And the way I do it, after the transmission slows it down so far, it just starts turning free and won't hold, but going down that hill I pushed the clutch in and let it roll and pulled the clutch back out and it would grab, and I never did use my brake.

Q. You would go down about thirty miles an hour?

A. About thirty miles an hour is about what I would go, and I would get it up to forty or forty-

(Deposition of George A. McDonald, Jr.)
five and let my clutch out, and I never did touch my brake.

Q. That was the same sort of setup?

A. Yes, sir, the same situation, transmission and everything. Where she made her mistake where she was going this fast—that whole drop I had I could be driving eighty miles an hour and stick it in second, you just have to know how to do it. Her rear wheels were turning the same speed of the engine, and instead of letting her engine up and then putting it in second, she didn't do that. I can be going eighty miles an hour and floorboard it and run it up as high as it will go and then it will slip right on in.

Q. None of these other ladies attempted to exercise any control or tell your mother how to go about it? A. That's right.

Q. On any part of your trip they didn't exercise any control over her mechanical manner of driving?

A. No, sir, so far as I know they all kept quiet as to how she drove.

Q. She was the one making the decisions?

A. She was making the decisions as a driver.

Q. There wasn't any equal decision between them? A. No, sir.

Q. That's all.

Further Redirect Examination

Q. (By Mr. Pipkin): Was there anything to keep Mrs. Aronson or anybody on the back seat of

(Deposition of George A. McDonald, Jr.)

that car at the time you were on that Pass and fixing to descend to see that it was a steep descent?

A. No, sir, there wasn't.

Q. Did Mrs. Aronson enter into the discussion?

A. I imagine she did.

Q. Did you notice whether or not she was doing any of the praying? A. Sure she was.

Q. That's all.

Mr. Cobb: That's all."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Johnson: The plaintiff rests on the question of negligence, Your Honor.

(Mr. Clasby moved for the dismissal of this cause and presented argument, and Mr. Johnson resisted the motion.)

Mr. Johnson: I suggest, Your Honor, that you continue the matter until tomorrow morning without decision.

The Court: The only thing that I am wondering about is whether you gentlemen at ten o'clock wish to present further authorities and argument and at that time I will rule after hearing your arguments.

Mr. Clasby: I plan on seeing what I can find in the cases. [56]

The Court: And I, of course, am going to see what I can find. Very well, this case will be continued until ten o'clock tomorrow morning, and Court will adjourn until ten o'clock tomorrow morning.

(Thereupon, at 4:30 p.m., October 9, 1956, an adjournment was taken until 10 a.m., October 10, 1956.)

Fairbanks, Alaska, October 10, 1956

Be It Remembered, that the trial of Cause No. 7728 was resumed at 10:00 a.m., October 10, 1956, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

Clerk of Court: Court is now in session.

The Court: Gentlemen, are you ready to proceed in Civil Cause 7728?

Mr. Johnson: The plaintiff is ready.

Mr. Clasby: We are ready, if the Court please.

The Court: Very well.

Mr. Clasby: At this time I would like the Court's permission to put on out of order a witness whom I have available and this is the most convenient time for him to testify, if I may do that and then go back to my argument.

The Court: Any objection, counsel?

Mr. Johnson: The only objection I might have would be as to whether or not counsel intends to use this witness' testimony in support of his present argument. If he does, I don't believe it is proper order. Otherwise, I don't have any objection. [57]

Mr. Clasby: I don't intend to. I think the Court can exclude it from consideration also.

The Court: Yes. You wish to put the witness on at this time out of order, the evidence to be con-

sidered in the defense, if you get to the defense, but without prejudice to your argument?

Mr. Clasby: That is right.

The Court: Very well, the witness may be sworn.

Mr. Clasby: Will you come forward, Mr. Thies, and be sworn?

DONALD WILLIAM THIES

called as a witness by the defendant, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Clasby): Would you state your name, please? A. Donald William Thies.

Q. Do you live in Fairbanks, Mr. Thies?

A. Yes, I do.

Q. You have lived in Fairbanks all your life, have you not?

A. No, I haven't. Twenty-one years.

Q. Twenty-one years. That is coming pretty close to it. What is your occupation?

A. I am foreman for Alaska Freight Lines.

Q. What during the last twenty years has been practically [58] your occupation?

A. Truck driver, mechanic, and handling freight.

Q. Out of Fairbanks? A. Yes.

Q. Were you acquainted in that connection with the highway between here and Valdez?

A. Yes, sir.

Q. Did your employment take you over that highway? Yes, sir; it did.

Q. For how long have you been driving that highway? A. Since 1942.

(Testimony of Donald William Thies.)

A. With considerable frequency?

A. More in the last year than I have for, I would say, about six years.

Q. Prior to that you drove it considerably also?

A. Yes.

Q. Are you familiar with the condition of the highway over Thompson Pass after the installation of blacktop in 1953? A. Quite well, yes.

Q. Will you describe for us in your own words the approach to Thompson Pass and then the highway down on the Valdez side of Thompson Pass?

A. I would say approaching from the relief cabin——

Q. Would you go by mile posts or the approximate mile posts? [59]

A. I believe Thompson Pass is 26 Mile and the road levels out——

Q. You started to talk about the relief cabin.

A. Coming up to the relief cabin it is quite a pitch. You would notice it right away in a car or truck more than in a car. As you approach the top of Thompson Pass it slightly levels off. I would say it levels off approximately for 1,000 feet, and then it has a gradual drop for approximately a quarter of a mile, and then it might accidentally—I mean it might level off just a short distance, and then it has quite a drop from there on down.

Q. What is the character of the road with reference to curves approaching the top and then going down the other side as they might restrict a person's vision?

(Testimony of Donald William Thies.)

A. If it was closed by fog banks, I mean, or clouds, I would say that a person that even knew the road wouldn't drive more than 15 to 20 miles an hour, because you cannot have any visibility; your headlights don't help you. All you can do is try to stay in the center line of the road or at the bank along the road. Even going through Thompson Pass you don't even notice the banks as you go through when it is closed in. You are just driving by what you can see of the road.

Q. Are you aware you are at a summit when it is closed in?

A. If you drive the road all the time, yes, but if you have never been over the road but a couple of times, you would never [60] know it.

Q. Again back to my other question, Mr. Thies, what is the character of the road with reference to turns that might restrict visibility, both going up from this side, as you near the summit, and going down the other side after you pass beyond the summit?

A. I would say from the relief cabin you would have two "S" corners approximately 2,000 feet from the top of Thompson Pass. Then the road fairly straightens out so that you would have, I say, 1,500 feet visibility in front of you. You could say it straightens out really over the top of Thompson Pass and makes a gradual turn to the left for, I would say that you could see approximately 1,000 feet in front of you. Then I would say a quarter

(Testimony of Donald William Thies.)

of a mile from the top of Thompson Pass is starts making winding turns again.

Q. That is the point where the descent becomes more steep, is it? A. That is right, yes.

Mr. Clasby: I have no other questions.

Cross Examination

Q. (By Mr. Johnson): How far is this relief cabin from the summit?

A. From Thompson Pass?

Q. Yes.

A. I would say approximately half a mile.

Q. I take it you go over this pass at night [61] quite considerably, do you not? A. Yes, sir.

Q. In both summer and winter?

A. Right.

Q. Does it have a tendency to cloud in or fog in at the summit even in the summertime?

A. Very often, yes.

Q. And are those clouds usually cloud formations, or is there ground fog, or what would you call it?

A. I think it would be more cloud formations.

Q. That hang right around the summit?

A. That is right, yes.

Q. What is the percentage of grade on the first quarter mile? I believe you said after you cross the summit or the top you start down, for a quarter of a mile you said the grade was rather gradual. What would you estimate the grade to be?

A. I would say six per cent.

(Testimony of Donald William Thies.)

Q. And then it increases after that; is that correct?

A. Yes, quite considerably, and then it levels off again.

Q. What would be the percent of grade below that approximately?

A. I would say eight to ten percent.

Q. That is fairly steep grade, is it not?

A. Yes, it is. [62]

Q. Even six percent in an ordinary road is a rather steep incline; is that not true?

A. Yes.

Q. Do you know about how long the descent is on the Valdez side of the pass before it levels off on the bottom of the canyon?

A. I would say approximately nine miles.

Mr. Johnson: That is all.

Mr. Clasby: That is all.

The Court: Do you think you gentlemen can establish by this witness whether or not the relief cabin that he speaks of is the same place that the party stopped prior to when they went to the summit? I haven't heard anything about a relief cabin before.

Mr. Johnson: I believe I asked him about how far the relief cabin was and he said half a mile from the summit, and my recollection of the testimony is that—well, may I continue with this witness a little?

The Court: Yes. I wonder if the witness can tell us at what mile the relief cabin was located?

(Testimony of Donald William Thies.)

Q. (By Mr. Johnson): Do you know at what mile post the relief cabin is?

A. I would say about 26½ miles or 27, I believe.

Q. What sort of a cabin is it?

A. It is actually a Road Commission Camp. [63] They have put up a concrete building, but what I spoke of was an old relief cabin there years ago, but there is a concrete building there now that the Road Commission keeps their maintenance equipment in.

Q. Is that used by tourists for any sort of overnight accommodations or anything? A. No.

Q. Are any meals served there?

A. Not that I know of.

Q. Are there facilities for warming or anything of that sort?

A. I believe they would let you in if the road was closed, yes.

The Court: I believe you should be restricted as to what it was at the time of the accident, rather than what it is today.

Mr. Johnson: I beg your pardon, Your Honor.

Q. (By Mr. Johnson): The accident that is involved in this case happened in the summer, in July of 1953. Would you say that this relief cabin had been changed since that time, or do you recall when it became—— A. That I couldn't answer.

Q. You don't know whether it was before or after that? A. No, I don't. [64]

Q. Has it been a Road Commission garage or

(Testimony of Donald William Thies.)

maintenance shed for quite some time, would you say? A. Yes, it has.

Q. And you have been driving over this road for several years?

A. I have drove since 1942 off and on, yes.

Q. You have been familiar with it ever since?

A. Yes.

Q. During that time it changed from an old relief cabin into a——

A. ——a maintenance shop.

Q. But you don't know when?

A. No, I don't.

Q. Now, is there some sort of a garage or filling station at 56 or 57 Mile, do you remember?

A. There was a roadhouse there, I believe, at 60 Mile.

Q. In that vicinity. What is the name of that?

A. There is Tea Kettle, for one.

Q. Tea Kettle? A. Yes.

Q. Was that there during the summer of 1953?

A. Yes.

Q. Is there anything between that roadhouse there and Valdez? A. Yes, there is 35 Mile.

Q. 35 Mile Post, that woud be about 10 miles north of Thompson Pass; is that correct?

A. Yes.

Q. Was that there during the summer of 1953?

A. Yes.

Q. What type of accommodation is that, or what is it?

A. It is a roadhouse with a filling station and I

(Testimony of Donald William Thies.)

don't know if they do any work on cars or not if they have trouble. That I couldn't answer.

Q. And you say that is at 35 Mile Post?

A. Yes.

Q. Is there anything between that and the summit? A. No.

Q. Beyond——

A. That Road Commission was the only building in between there.

Mr. Johnson: I believe that is all.

Redirect Examination

Q. (By Mr. Clasby): Going up the summit and in the area about the summit, how wide is the blacktop? A. That has a 22-foot span.

Q. Is there any shoulder beyond the blacktop on the righthand side of the road going toward Valdez in the area around the summit? [66]

A. It varies. Some places it has and some places it has none. Very little, I would say.

Mr. Clasby: I think that is all.

Mr. Johnson: That is all.

(Witness excused.)

Mr. Clasby: May it please the Court, we have one other witness on the same subject and I ask for permission for Mr. Cole to examine him.

The Court: Any objection, counsel?

Mr. Johnson: No objection.

Mr. Cole: We call Jim Groves to the stand.

JAMES E. GROVES

a witness called by the defendant, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Cole): State your name, please?

A. James E. Groves.

Q. How old are you, Jim?

A. Twenty-eight.

Q. What is your occupation?

A. Truck driver.

Q. How long have you been a truck driver?

A. I have been driving up here for four years.

Q. In Alaska? [67] A. Yes, sir.

Q. Did you drive truck before you came to Alaska? A. Yes.

Q. Where did you drive? A. Idaho.

Q. Where was that?

A. Sand Point, Idaho.

Q. Is there a lot of mountainous country around Sand Point, Idaho?

A. Yes, sir. Yes, narrow, rough roads.

Q. So you spent most of your time driving over narrow, rough roads? A. Yes, sir.

Q. In Alaska you have been driving four years for whom?

A. Gene Rogge, Sourdough Freight Lines.

Q. Since you have been driving in Alaska for four years, between what points have you been driving? A. Fairbanks and Valdez.

Q. Exclusively pretty much? A. Yes, sir.

(Testimony of James E. Groves.)

Q. How many trips a week do you make between Valdez and Fairbanks?

A. An average of two trips.

Q. You average two trips a week; that means you cross over Thompson Pass four times a week?

A. Yes, sir.

Q. And that means you would make approximately 200 trips between Fairbanks and Valdez in four years? A. Yes, sir.

Q. And you have crossed over Thompson Pass approximately, since you have been here during the last four years, 400 times?

A. Yes, sir; I guess so.

Q. Approximately, of course. A. Yes.

Q. That makes you pretty familiar with Thompson Pass and the entire highway between here and Valdez? A. Yes, sir.

Q. Have you ever driven over Thompson Pass at night when it is dark?

A. I would say seventy percent of the time is going over Thompson Pass in the dark.

Q. And you have driven over Thompson Pass when it was foggy? A. Yes, sir.

Q. Characteristically, when it is foggy on Thompson Pass is it just light fog or dense fog? What is the general fog condition there?

A. Ninety percent of the time when it is foggy up there you can't see as far as from here to the courtroom door there (indicating). [69]

Q. In other words, when there is any fog at Thompson Pass it is so foggy that you can hardly

(Testimony of James E. Groves.)

see across the road? A. That is right.

Q. And, of course, you have driven over Thompson Pass at night there in the fog? A. Yes.

Q. The visibility is very restricted at that time?

A. It is very poor.

Q. Traveling from Mile 56 towards Valdez—incidentally, let me preface that—what is the Mile Post approximately at the top of Thompson Pass?

A. 25 Mile.

Q. As you are traveling towards Valdez from Fairbanks and you start to climb towards Thompson Pass, what Mile Post approximately does the climb begin? A. From——

Q. I am sorry. Perhaps I didn't make my question clear, but when you are traveling from Fairbanks towards Valdez, at what Mile Post do you begin the climb of Thompson Pass, roughly?

A. Well, actually, to go into the Pass, you would be starting in at about 34 Mile, but going from Fairbanks to Valdez, right at 47 Mile you start climbing, and any person that hadn't been over it frequently enough, as I have, you just figure you are starting over the Pass.

Q. At about Mile 47 you start up? [70]

A. At about Mile 47 you start up and you go up and down and up and down. Actually, you don't know where you are at.

Q. So you climb over between Mile Post 47 and Mile Post 25? A. Yes, sir.

Q. And that climb is not a straight line climb?

A. No.

(Testimony of James E. Groves.)

Q. During the climb are there dips and periods of time at which one might well believe, as a careful driver, that they were beginning to go down hill and not know that there was a further climb beyond?

Mr. Johnson: We object to that, if the Court please, as being leading and suggestive. I think he should let the witness tell what he saw or knows about it.

The Court: I think this question may stand. He may answer it.

A. Yes, there is particularly one hill, 40 Mile hill, where you climb up for a while and then you go down and then you level off and go around a curve, so a person naturally wouldn't know what is ahead, no.

Q. (By Mr. Cole): As you approach the summit at Thompson Pass and getting very close to the summit of the Pass, what is the nature of the grade in that area? Is it a steep climb? A. No. [71]

Q. Or is it pretty much a gradual climb?

A. It is a gradual climb. I would say there isn't any of it over four percent grade.

Q. What is the nature of the roadway at the top of Thompson Pass? Is it level or is it pretty level there, or when you get to the top do you immediately start down a steep incline?

A. When you get to the top it is more or less level for a little ways, I would say two or three hundred yards, but there is nothing that is real steep right at the top.

(Testimony of James E. Groves.)

Q. How far does one travel from the actual summit or the top of the Pass until the highway becomes steep, what you might call steep, or the road becomes a large grade?

A. I would say a mile and a quarter to a mile and a half.

Q. So after you have reached the summit and started down you travel over fairly level country for about a mile and a half, at which point the road becomes steep? A. Yes, sir.

Q. If you were driving an automobile over Thompson Pass at night, in the fog, would you know when you actually—would you know definitely when you came to the top of the Pass?

A. If I was a total stranger to the road, no, I wouldn't know.

Q. How far would you be down the other side before the [72] average driver would realize that he was traveling down a precipitous mountain pass slope?

A. Well, I would say you would be over half or three-quarters of a mile before you would ever realize it, if you went according to the road that you had just previously been over.

Mr. Cole: May we use the blackboard?

Q. (By Mr. Cole): I hand you this piece of chalk and ask you if you would draw on the blackboard the general contour of the road in the area of Thompson Pass, say, from one mile on the Fairbanks side of the summit to three or four miles on the other side of the summit?

(Testimony of James E. Groves.)

Mr. Johnson: We object to that on the theory that he is not qualified, your Honor. There has been no basis laid for that type of testimony. He doesn't show he is an engineer or made any surveys or anything as to the contour.

The Court: He has testified to his familiarity with the road. Now counsel asked him if he is able to do what he asked him.

Q. (By Mr. Cole): Jim, on the basis of your experience and traveling over the Thompson Pass area, are you able to draw the contour of the road from approximately one mile on the Fairbanks side of Thompson Pass to three or four miles on the Valdez side of Thompson Pass? [73]

A. I would say I would.

Q. Would you please do so?

A. Right here you have 27 Mile Road Commission snow camp, coming from Fairbanks. Then on a straight—it is more or less level up to the Road Commission camp that is at 27 Mile, then you make a sharp curve there and then you go up hill on, I would say, a four to five percent grade (witness drawing sketch).

Q. Excuse me, would you mark four to five percent grade in there?

A. (Witness marked sketch accordingly.) It is approximately 200 feet long, and then you go up and wind a little bit and then you come to the top of the Pass. Right before you hit the top of the Pass, I would say it is about a two percent grade right in here (indicating), and then right in here

(Testimony of James E. Groves.)

(indicating) would be the top. Then there is a slight curve at the top, oh, about a 30-degree turn. Then it gradually slopes down about, this grade right here (indicating) would be about three percent, and then you go around a corner about 30 degrees and then it starts down.

I have run out of room here.

Q. If you want to continue this drawing right here from this point, you may do so.

A. It starts down and it curves, I imagine, let's see, there are three curves in there. There is three curves and then [74] you come across this flat stretch about ¼ mile wide, and then you go around what they call the old 400-foot pitch. It is a fairly sharp curve. It is just a little more than normal for Alaska highways, and then you go around the curve and down to a little flat stretch about 200 or 300 yards long. Then you start down four miles—it is a little more—six to eight percent, and four miles long.

When you get to 21 Mile there is an "S" turn. Then it straightens out and comes down to 19 Mile, which is at the bottom.

Q. On the basis of your earlier testimony, would you mark the point at which you would estimate you testified that a driver driving over this highway for the first time in the conditions of darkness and fog would probably realize you were then descending a mountain pass?

Mr. Johnson: We object to that as calling for a conclusion by the witness which he isn't qualified to

(Testimony of James E. Groves.)

make, your Honor. After all, it would be simply his own idea. There is no basis in the record for any such question.

The Court: He may answer, if he is able.

A. I would say from this point here, which is the top of four-mile hill to here (indicating) is the bottom, a person wouldn't have to go over a mile, three-quarters to a mile, and he would realize by then that he was in steeper country than he bargained for—you wouldn't go over a mile. [75]

Q. But you probably wouldn't know that before that point?

A. If it was foggy and at night, you wouldn't know that, no.

Mr. Cole: That is all.

Cross Examination

Q. (By Mr. Johnson): Mr. Groves, what do you mean by a three percent grade?

A. Now, for instance, if that was level, I would say a three percent grade was about like that (indicating). A six to eight percent grade would be going about like that (indicating).

Q. Yes, but I mean: how much drop is that in 100 feet, for instance, to make it a six percent or a three percent grade? Is that the way to measure it? A. Well, engineers do, I guess.

Q. But you have no particular——

A. I would have no—I would have to get my pencil and paper out.

Q. Well, now, this fog that you speak of, is

(Testimony of James E. Groves.)

that usually ground fog or is that cloud formation, or what, as a general rule?

A. As a general rule I believe it is a little of both, which lays right on the highway, and you can't see over 20 feet ahead of you.

Q. Does it ever lay up off the highway a little?

A. I have never seen it lay off the highway.

Q. I just wondered if you had ever seen it. Then, it is your opinion that this is probably more ground fog than it is a cloud formation, since a cloud formation might move up and down, or something of that sort, might it not?

A. Well, guessing, I would say it would be more or less ground formation, ground fog. There wouldn't be any clouds.

Q. You say that the top of this summit is about two to three hundred yards, I think you said, once you reached the top?

A. To reach the top you travel about 300 yards, yes, before——

Q. And that is comparatively level; is that correct? A. It is about two percent grade, yes.

Q. Where does this grade of two percent stop?

A. The two percent grade would be from the Valdez end.

Q. I am talking about when you leave the snow shack or the snow shed you talked about and start up, there is a three percent grade to begin with, and then you go around that curve, or is that four percent?

A. Just before you get to the top, this is the

(Testimony of James E. Groves.)

snow camp, you climb a grade here which is four to five percent.

Q. That is a rather steep grade?

A. A rather steep grade right here (indicating). When you get right here, right at the top, it isn't over two to three percent, right here (indicating.)

Q. Which way?

A. Either way you want to go.

Q. Is it flat on top at all?

A. It just kind of crowns over.

Q. So that actually on the surface, or what they call the top, there is no point that is two or three hundred yards where the grade is level, at no point?

A. At that particular point, no. There is a grade either way; right at the top there is no particular point——

Q. So when you go over this crown you start down immediately even if it is only a two percent grade or so; is that right?

A. A person wouldn't know he was going down, no, because it isn't that steep.

Q. When you are driving a big truck at night, even at one percent grade, you know you are going down hill, don't you?

A. Sure, I know I am going down hill.

Q. Even to one who had never been over the road before and even a one percent grade would certainly be noticeable, would it not?

A. I would notice a one percent grade, someone in a truck would, but in a car I wouldn't as much, no.

Q. You certainly would notice the difference in

(Testimony of James E. Groves.)

a car between pulling on an upgrade and the release of power on a down grade, isn't that correct, even with an automobile? [78]

A. You would with an automobile, but the grade right there isn't that great.

Q. It becomes even two or three percent beyond that very quickly, doesn't it—I mean it gets down to three percent pretty much?

A. Yes, within about 200 yards from the top you go around a curve and then your grade starts down.

Q. But all the time that you are reaching that point the grade is going down, isn't it?

A. Yes.

Q. After you go over the hump? A. Yes.

Mr. Johnson: That is all.

Mr. Cole: I have no other questions.

The Court: I am a little confused on the witness' percentage of grades. You drew, did you not, at the top of the blackboard, what purports to be a straight line?

The Witness: Yes, sir.

The Court: And you have two diagonal lines. Will you specify what you consider the percentage of grade on the two diagonal lines?

The Witness: This is just more or less guessing at the grade, but I plan that for about three percent (indicating) and this for about a six per cent (indicating).

The Court: Very well. [79]

Mr. Cole: May I ask the witness one more question?

(Testimony of James E. Groves.)

The Court: Certainly.

Redirect Examination

Q. (By Mr. Cole): As you draw that there on the blackboard, you don't purport to have that accurately reflect a two percent grade?

A. No.

Q. It is just a very rough sketch to illustrate that a six percent grade is steeper than a three percent grade? A. That is right.

Q. But that doesn't purport to show or reflect accurately that lower line is a six percent grade?

A. No, because I am no engineer.

Q. Yes; it is just for illustrative purposes?

A. Yes, sir.

Mr. Cole: That is all.

Recross Examination

Q. (By Mr. Johnson): However, it does illustrate the proportionate difference in the grade, does it not, in the pitch? A. Yes.

Mr. Johnson: Thank you. That is all.

Mr. Clasby: I have one more question, if the Court would permit me.

The Court: Very well. [80]

Redirect Examination

Q. (By Mr. Clasby): Jim, you are familiar with sections of highway where the grade is known to be two percent and sections of highway where grades are known to be four percent, and sections of highway where grades are known to be six percent, are you not? A. Myself, yes.

(Testimony of James E. Groves.)

Q. So you are able to, with that knowledge, pretty well estimate what the grade is in sections of highway that you haven't been told by an engineer what the actual grade is?

A. That is right.

Mr. Clasby: That is all.

(Witness excused.)

Mr. Clasby: That is the evidence that we wished to put in out of order so they can go back to work.

The Court: Very well. When we adjourned yesterday afternoon I announced that because of the importance of this matter, I would permit counsel to present additional argument and authorities this morning in connection with the motion to dismiss, and at this time I will hear from counsel.

(Thereupon Mr. Clasby presented further argument in support of his motion to dismiss.)

Mr. Clasby: Could we adjourn until 1:30. I have arranged for one more witness that I thought we would be ready for at that time—he is an employee —at 1:30. [81]

The Court: One more witness that you wish to call, again out of order?

Mr. Clasby: Out of order, and that concludes my case, out of order.

The Court: Then, I might ask about the availability of that witness, why it is necessary to call him out of order?

Mr. Clasby: He is a mechanic at a garage. His

time is not his own. I talked to him this morning on the phone and he said he was on a job now that he anticipated he would be through with at noon and it would be more convenient to him if he could come at 1:30. I could probably get him to rearrange it until two o'clock.

The Court: As long as the arrangement is made, I am going to go along with you.

Mr. Clasby: I don't want to inconvenience the Court.

The Court: I think hereafter, however, before we take witnesses out of order there will be some showing of the reason for doing it other than the convenience of the witness.

Mr. Clasby: I realize that.

The Court: Very well, we will resume at 1:30.

Clerk of Court: Court is at recess until 1:30.

(Thereupon, at 12 noon, a recess was taken until 1:30 p.m.) [82]

Afternoon Session

(Thereupon, at 1:30, the trial of this cause was resumed.)

Clerk of Court: Court has reconvened.

The Court: Are the parties and counsel ready to proceed?

Mr. Johnson: The plaintiff is ready.

Mr. Clasby: With the Court's permission, we would like to call Mr. Hutchison.

JAMES HUTCHISON

a witness called in behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Clasby): Will you state your name, please? A. Jim Hutchison.

Q. What is your business or occupation, Mr. Hutchison?

A. Mechanic for Fairbanks Motors.

Q. How long have you been a mechanic for Fairbanks Motors?

A. Let's see—ten years.

Q. And for a considerable portion of that time have you been the shop forman? A. Yes.

Q. Is the firm the local distributor for Dodge automobiles? A. Yes.

Q. In your work, have you had occasion to [83] service and repair Dodge automobiles?

A. Yes.

Q. Are you familiar with the transmission on the 1953 Dodge Coronet? A. Yes.

Q. For how long have you been familiar with that transmission?

A. They first came out in 1952—no, it came out in 1947, actually, that is, the M-6, the automatic transmission.

Q. You have been familiar with it since it came out? A. Yes.

Q. Do the drivers receive factory manuals on transmissions? A. Yes, they do.

Q. Are you familiar with the factory manual on it? A. Yes.

(Testimony of James Hutchison.)

Q. Do the drivers also receive bulletins from the factories advising of the idiosyncracies or difficulties, if any, relating to a part of the car from time to time? A. Yes.

Q. Are you familiar with such bulletins as have been received by Fairbanks Motors from the factory with respect to the transmission of a 1953 Dodge? A. Yes.

Q. Have you had occasion to repair such transmissions? A. Yes. [84]

Q. Frequently? A. Not frequently.

Q. But you have had occasion to? A. Yes.

Q. Are you familiar with their operation?

A. Yes.

Q. Would you explain to the Court first the type of transmission that is on the 1953 Dodge Coronet?

A. It is an M-6. It is an automatic hydraulically controlled transmission. It has four speeds: two speeds in power gear and two speeds in the high gear.

Q. In other words, it has two speeds forward and in addition a dual range?

A. That is right, it has a dual range in the high gear.

Q. And how is the mechanism activated?

A. It is manually controlled by a shift lever and also by hydraulic oil on a mechanical linkage within the transmission and electric solonoid and governors.

Q. Is there a clutch or other apparatus that is necessary in its operation?

(Testimony of James Hutchison.)

A. Outside of the regular clutch that is in the car, there is a clutch in the car to de-clutch.

Q. Assuming you were starting that automobile from a standstill. Explain to the Court the procedure you would go through into high gear. [85]

A. The first thing you do is depress the clutch pedal and pull the transmission down to the driving range with the high gear and release the clutch and you are in what they call the second speed. As you press the foot feed contact off and release the foot feed, that puts it up into a different range. That is high gear.

Q. And that is the range used for all normal operations? A. That is right.

Q. You spoke of a low range or low gear range being possible. Would you explain how to activate that in operation?

A. If you start out, say, from a dead standstill, put the transmission into, on an ordinary car, into second gear, that would be low gear, you depress the foot feed and build up to about six to eight miles per hour, then release the foot feed, and it will go into what you call the second speed. That is actually, in comparison with an ordinary car, it would be the second gear. It shifts automatically by hydraulic pressure. That would be your power gear. There are two speeds in the power gear.

Q. Would it be necessary to depress the clutch and again shift in order to get from the power gear over into the normal driving range gear?

A. Not ordinarily, but most of the people do

(Testimony of James Hutchison.)

that. You can pull it down with the high gear without shifting or depressing.

Q. Presuming the car is in operation and going down a hill and it is in the high range, would you [86] tell us how one would go about getting it into this low range, or low gear?

A. The only way you could get it down into low gear would be to fully depress the foot feed, which would kick it down below forty miles an hour. Above forty miles an hour it will not kick down, unless you move the gear shift lever into the second speed. If the car is going at a high rate of speed, that isn't possible.

Q. Let's presume you are going twenty miles an hour and you want to get it into low range.

A. You would depress the clutch pedal and it would go into second speed.

Q. It would go in if the car were going that slow? A. Yes.

Q. If you were going forty miles an hour, how would you accomplish it?

A. Actually, it would be the same operation, except you would have to double-clutch the car, because it will not go in by just depressing the clutch and trying to ram it in. That just won't do it. You have to speed your transmission up in order to mesh the gears properly.

Q. You would depress the clutch, move the gear, release the clutch, and accelerate the engine as fast as you could get it to go? A. That is right.

Q. And depress the clutch again and then shoot it in? A. Yes. [87]

(Testimony of James Hutchison.)

Q. With the disk type of clutch, a person with practice can become familiar with how to do that?

A. Yes.

Q. Does the hydraulic coupling make any difference?

A. No. That is a solid unit. After the engine builds up a certain amount of speed, it locks.

Q. Then, your testimony is further that if the speed was much greater it would be impossible. Is that founded on the fact that you couldn't accelerate the engine, turn the R.P.M. up fast enough, to permit it to go into second gear?

A. That is the idea.

Mr. Clasby: I think that is all.

Cross Examination

Q. (By Mr. Johnson): Jim, isn't it a fact that on that type of transmission you have two ways of shifting from, let us say, third to fourth? When you shift into the driving range, let us say, after depressing your clutch pedal and pushing the gear shift level up, it is in third gear automatically. But now when you want to shift it to high, you can do that one of two ways, can't you? You can either depress the gas pedal a little bit and speed it up more and more, and then take your foot off, and it will automatically shift into high?

A. If it is in the high range already. [88]

Q. I mean in the high range. If you don't do that and keep your foot on the gas pedal and keep pressing it down, eventually it will reach a speed where it will also change into high?

(Testimony of James Hutchison.)

A. No, you have to release your foot feed in order to get it to shift.

Q. The one you sold me used to do that, I don't know—on a hill, particularly, if you would push it clear down to the floor you would get the engine speed up enough so it would change into high without doing it either way—I am talking about a gyrotorque transmission.

A. That is the transmission, exactly.

Q. The kind I had on the Dodge you sold me?

A. The only way it will upshift, if you have made a shift from—you started out into high gear, you accelerated up to 35 miles an hour, the only way it will shift is by releasing the foot feed.

Q. Doesn't it have what they call a passing speed shift in there?

A. It has. If you are in high gear and below 40 and you want to pass a car, you mash down the foot feed as far as it will go, it will automatically shift down one gear so you can pass that car. It gives you more acceleration, yes.

Q. Have you ever been over Thompson Pass?

A. Yes, many times.

Q. And you are familiar with that long hill [89] that goes down toward Valdez?

A. Yes, I am.

Q. Assume that you had a 1953 Dodge Coronet like the one I used to drive—you know that car?

A. Yes.

Q. And assume that you had reached the top of Thompson Pass, but before that, oh, say, 50 or

(Testimony of James Hutchison.)

25 or 30 miles before that you had punctured the brakeline and all of the brake fluid had escaped from the foot pedal or the brake and you had no foot brakes at all but you still had the hand brake which is a type of brake that clamps down on the drive shaft; isn't that it? A. Yes.

Q. And assume that you got to the top of Thompson Pass and not knowing exactly the type of road it was except that it was going down and you had stopped. Now, if you had that condition and knew how to drive that car, would you put it in first gear or in driving range?

Mr. Clasby: To which we object, if the Court please, it being a hypothetical question first posed on cross-examination without the purview of direct examination, and secondly not embracing all the facts within this case. It doesn't give the witness the same picture and circumstances as were known to the driver of this car in many, many respects.

The Court: I am worried about the answer to the question on both grounds urged. One is that [90] it is not within the scope of the direct examination and, second, I am wondering whether it is admissible here to state what an expert might do. Maybe it is proper, but I am not sure.

Mr. Johnson: Well, I will withdraw the question.

The Court: Very well.

Q. (By Mr. Johnson): If you were using a car of this kind on a long hill, would it be advisable, do you believe, to put it in the power range if you

(Testimony of James Hutchison.)

were starting a long descent that varied anywhere from two to four to six percent, we will say?

A. Yes. I would use the power gear, for that long hill, if you didn't want to use brakes or if you didn't have any brakes, the thing is, if you stop on this hill or use your power, you have to use the transmission upshift. It will not shift by itself.

A. That is going up? A. That is going up.

Q. But I am thinking of in going down.

A. If you stop on a hill and put the transmission in first gear, it has to shift into second gear to get the brake out of the engine.

Q. That is going up?

A. No, that is coming down, too. You can still make an upshift and still come down against the engine.

Q. But the chances of braking are much better in the power range? [91]

A. Yes, they are, but you can't get a power range in that low range, actually. If you just let the clutch out, it won't do anything except freewheel.

Q. The clutch and transmission are separate?

A. That is right.

Mr. Johnson: That is all.

Redirect Examination

Q. (By Mr. Clasby): If I am grasping your testimony, as I understand it, let's talk about the normal driving range for a moment. When you put your car in gear and let up on the clutch and

(Testimony of James Hutchison.)

de-accelerate, start rolling, you start rolling with a high gear ratio, and if that car goes ahead and then starts down a little bit of an incline where the driver would, let us say, take his foot off the gas, and the car picked up a little bit more speed, it would hit a point where it would automatically go into a less high gear ratio?

A. It should, yes.

Q. And, if I understand it, it is an automatic transmission?

A. That is right. Like on your first gear range, you say, you start out in the low range, low gear, and you accelerate up, say, to 15 miles an hour, then release the foot gear, it will go into another gear. If you still hold on the foot gear, it will not.

Q. As long as you continue holding down on the foot feed, you have no compression on the car?

Mr. Johnson: If the Court please, this is a leading question. I think he should let the witness testify. I object, on the ground that it is leading and suggestive.

The Court: Overruled.

Mr. Clasby: Isn't that right?

The Witness: State that question again.

Q. (By Mr. Clasby): As long as you are applying power, you haven't any engine compression holding it back, and you are gradually increasing speed? A. That is right or holding——

Q. Is it correct to say that on that car, once you get it in low range when you start out and it is in low range, the only way you are going to

(Testimony of James Hutchison.)

keep that compression and keep it in low range is take your foot off the accelerator and keep the car at 15 miles an hour; the minute it gets over that it will automatically shift into the next higher range and give you more acceleration?

A. It will upshift into second speed.

Mr. Clasby: That is all. [93]

Recross Examination

Q. (By Mr. Johnson): But that second speed has still more compression and braking power than the high range, doesn't it?

A. Yes, very definitely.

Mr. Johnson: That is all.

Mr. Clasby: That is all.

(Witness excused.)

Mr. Clasby: We express our thanks to the Court for permitting this out of order.

The Court: Very well.

Now, I believe at this time it will be proper for me to rule on the defendant's motion; is that correct?

Mr. Clasby: Yes, that is correct, at the end of the plaintiff's case.

The Court: Yes. I enjoyed the argument of the defense counsel first on the proposition of the family-car doctrine, and if I were called upon to pass on that question, without pressing it, I would likely favor the strict interpretation of the law, statutory and otherwise, but in view of the former decision in this Territory and the many States of the Union

that have adopted the family-car doctrine, I think that I would be unwise to put my judgment ahead of all those authorities and attempt at this time to upset what appears to be the settled law in the Territory of Alaska, as well as in many other jurisdictions, and I will adopt what has been called the humanitarian rule. [94]

Now, I don't mean, in making my ruling, that I think there is no force or effect or weight to the defendant's argument on the question of negligence and assumption of risk, but at this time and under the state of the record I think that the plaintiff has made out a prima facie case such as would not permit me to grant the motion to dismiss. At least, at this time my thinking is that the plaintiff's intestate, in riding in the car, knowing that the brakes were defective, certainly amounted to contributory negligence or assumption of the risk insofar as the defective condition of the foot brakes was concerned, but I don't believe at this stage, that once she assumed that risk or if she was guilty of contributory negligence, that that means that from then on the driver of the motor vehicle was relieved from the duty of using reasonable care for her safety and the safety of the plaintiff's intestate. In that I may be wrong, I realize, but counsel has mentioned, I believe, the situation where the foot brakes might have burned out on the way down the mountain. Then what would have been the duty of the driver? I don't think she would have had as great a duty under those circumstances as she had under the circumstances in the instant case,

as she wasn't faced with the unexpected emergency in the illustrated case, but here she knew full well that she had no foot brakes and with that knowledge she also knew that she was going to descend a dangerous mountain road, and I think that the plaintiff's case so far has made out a prima facie [95] showing that the driver of the motor vehicle did not use reasonable care for her safety and for the safety of the plaintiff's intestate, and I therefore deny the motion.

Mr. Clasby: At this time, we submit as part of our case the testimony that has been put on out of order. In addition to that, I have one other element that I have never been able to determine whether it is a matter of evidence or a matter of law: that is the regulations governing the use of highways and vehicles in Alaska. If the Court feels this regulation should be introduced as an exhibit, I will see if I can get ahold of a booklet. I am under the impression that they are sufficiently a matter of law that the Court can take judicial knowledge of them and we may not have to introduce the booklet, but I don't want to foreclose using the law that is in that by my failure to introduce the booklet if the Court feels that is essential.

The Court: Mr. Johnson, what is your thinking on that?

Mr. Johnson: Well, while it is true that I assume the booklet he refers to is the booklet of rules and regulations published by the Highway Engineers' Office and the Territorial Highway Po-

lice, however those rules and regulations, as such, are not statute law, and whether the Court can take judicial knowledge of them as such I do not know.

I believe that these pamphlets are readily available and it would be a very simple matter to get one and put it in evidence, if that is counsel's [96] desire, and I think it would be of considerable help to the court to have it in the record.

The Court: Do you have such a copy?

Mr. Clasby: I can get one. My point was——

Mr. Johnson: I don't even know what he is talking about or what part of these rules and regulations he has in mind. Excuse me for interrupting, but it is quite a thick little booklet and there are a great many rules and regulations contained in it and he should mention what he has in mind.

The Court: I am wondering at this time what particular rule or regulation you might think would be pertinent to this case.

Mr. Clasby: If I were to discover it in a statute, I would pull down the code and say, "Here it is," but the law relating to the operation of motor vehicles is not found in our statutes. It is found in the regulations made by the Alaska Road Commission under authority of the statute. I don't want to come in an hour from now and pick up a book and start reading to the Court and say, "This is the law," and the Court saying, "I can't consider it because I can't take judicial knowledge of a regulation." I am convinced the Court can, but I did not want to argue that point as a matter of law.

The Court: I think Mr. Johnson has indicated

a willingness to stipulate to obviate any misunderstanding, if you will tell him what particular document you wish covered by the stipulation.

Mr. Clasby: I would like to have considered as [97] a part of the record the regulations of the Road Commission relating to the operation of motor vehicles and equipment on motor vehicles that were applicable in the year 1953, and the only regulation I have in mind possibly calling to the Court's attention as pertinent would be that requiring brakes and making the operation of the motor vehicle without brakes a violation of the law.

Now, to get into the question of negligence per se, I don't think that it is particularly material, but it is something that the Court would take cognizance of automatically if it were a statute, and should do the same thing with respect to the regulation which we go by, as having the same effect in law as a statute.

Mr. Johnson: May it please the Court, I am perfectly willing to stipulate that the regulations may be used by counsel in argument if he produces a copy and reads from it, so that I might do the same thing.

The Court: Very well. I think it is understood that that may be used by either counsel and by the Court.

Mr. Clasby: And by the Court. Then, on that basis we at this time rest, and of course renew our motions in the light of the additional evidence and are in a position to argue our position on the merits now that all the evidence is before the Court.

(Mr. Clasby presented additional argument on his motion to dismiss.) [98]

The Court: If something has happened here that shouldn't have, I was just wondering, it could be my fault. I am wondering if your argument and your motion wasn't premature. I don't know whether the plaintiff intends to put on any rebuttal or not. You didn't have an opportunity for rebuttal.

Mr. Johnson: I wondered about that, but counsel went ahead without giving me an opportunity. I would like to call Mr. Aronson for just one question, as long as counsel has raised it by inference, at least, in his argument. It won't take but a minute.

The Court: Well, I think I am going to take a ten-minute recess, at which time you should consider what you wish to put in in rebuttal, and of course you will have the whole facilities of the Court for this afternoon, tomorrow, or next week, if you so wish.

Mr. Johnson: Thank you, sir.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

The Court: Are you gentlemen ready to proceed?

Mr. Johnson: The plaintiff is ready, your Honor. I would like to recall Mr. Aronson for a question or two, if I may.

The Court: He has been sworn. You may take the stand, Mr. Aronson.

EARL G. ARONSON

the plaintiff, resumed the stand in his own behalf [99] in rebuttal, and having been sworn previously, testified further as follows:

Direct Examination

Q. (By Mr. Johnson): Mr. Aronson, did your wife, to your knowledge, ever drive the McDonald automobile? A. No, sir.

Q. Did your wife, to your knowledge, know anything about so-called automatic transmission or a gyro-torque transmission, such as the McDonald automobile had? A. No, sir.

Q. Had she ever driven a car at all?

A. She drove my car. It had a standard shift.

Q. And that is all that she had ever driven; is that correct? A. Yes, sir.

Q. Did she know anything about the gears or the gear shift on an automobile of the type that was involved in this accident? A. No, sir.

Mr. Johnson: That is all.

Cross Examination

Q. (By Mr. Clasby): How old was she at the time of the accident? A. I think 48.

Q. For how many years had she been driving a motor vehicle?

A. Well, about fifteen years, to my knowledge.

Q. And was all of her driving experience with conventional shifts, or had she operated a Model T Ford?

A. No, the standard shift, the regular shift,

(Testimony of Earl G. Aronson.)
what they call a standard shift, is the only kind of car I ever owned.

Q. And she always drove your car?

A. Yes, sir.

Mr. Clasby: I think that is all.

Mr. Johnson: Does the Court have any questions?

The Court: No questions.

Mr. Johnson: That is all, Mr. Aronson.

(Witness excused.)

Mr. Johnson: The plaintiff rests on the question of liability.

Mr. Clasby: We have no sur-rebuttal.

The Court: Both parties having rested, I assume that the record will show that your motion is now renewed?

Mr. Clasby: Yes, my whole argument should be considered as if it were taking place now or had taken place now.

The Court: Is that satisfactory, Mr. Johnson?

Mr. Johnson: I have no objection.

The Court: Very well. Now, at this time, Mr. Johnson, I will hear from you in opposition to the defendant's motion to dismiss.

(Thereupon Mr. Johnson presented argument resisting the motion to dismiss.) [101]

(Mr. Clasby presented rebuttal argument in support of his motion.)

The Court: Gentlemen, I wish the matter were as clear to me as it is to each one of you counsel.

In my mind we have some very, very serious legal questions and factual questions upon which those legal questions may depend. I think, at least, I agree with defense counsel that if the accident were proximately caused by the defective foot brakes, then the plaintiff cannot maintain this action, because it is clear that she acquiesced in riding in the car, knowing of its dangerous condition—knowing it did not have foot brakes.

The fact that counsel has not commented on the features that are worrying me the most, or if you have commented, I didn't grasp your arguments, I want you to know that the thing that is bothering me the most—suppose I should find, and I can, from the evidence — there was some discussion among the attorneys where this car was stopped when they had the so-called prayer meeting—but suppose I should find, as testified by the young man, that from where they had the prayer meeting after the fog lifted she could see—Mrs. Dickerson said she couldn't see even when they started up, but George McDonald said he could see and he saw there was a drop from there on, that is, right where they had the prayer meeting and the discussion as to whether they should go on or not, it was steep down ahead of them, trying to decide whether to go on without foot brakes. Now, suppose [102] I should find all of that, the part that troubles me greatly is this: the plaintiff has the burden of proof in this, there is no doubt of that, but wherein in the evidence, and maybe you can point it out to me, do I find any credible evidence that

it was, in fact, negligent for the driver of the car not to shift the level into low gear. Let us assume that that would be negligence, or let us not assume it. We can't assume it. Do I take judicial notice of the fact that had it been shifted into third gear that it would have gone down this particular mountain without mishap? Am I to take judicial notice of that fact? Am I a mechanic experienced enough, or supposed to be, to know the effect of that? I don't know how many miles it had on it, how much compression it had, I don't know how much it would have held it back had it been in second or third gear. I don't know a thing about it.

I suppose plaintiff is going to say, "We have the deposition of the boy and he gives an opinion" which he may or may not have been qualified to give, but he said in answer to this question I read from page 128:

"Q. Mr. Pipkin asked you based on your experience how in driving and your remembrance and recollection of what happened on that occasion, had she started down this hill in first gear and the hand brake set she probably could have made it?

"A. She would have made it I am pretty sure because I have driven several cars with the same transmission setup and everything."

And then he goes on to tell some of his experiences in stopping the car, but is that the type of evidence that I am to say is sufficient to sustain the burden of proof. That is the part that is bothering me.

In other words, where in the evidence do I find

this man, this boy who testified, doesn't show any familiarity with the particular highway in question, what would have been the result had the driver of the car put the transmission into a lower gear? I don't know. Am I to speculate against the defendant and find that the accident would not have happened or must I base such a finding on testimony and, if I must base my finding upon testimony, where is the testimony that this accident would not have happened had the driver of the car done something that the plaintiff claims she should have done and didn't do? Where is the evidence on that point?

That is where I am bothered. As I say, am I to take judicial notice of what would have happened to that particular car had it been shifted into a lower gear?

Mr. Johnson, I suppose that I am addressing that query to you, because that really has me bothered.

Mr. Johnson: Well, that presupposes just one thing. Either I ask leave to reopen the case and [104] try to produce some such testimony or else I get kicked out of Court, and I certainly don't want the latter to happen and therefore I now move to reopen the case for the purpose of trying to supply some expert testimony, if it is available, that will answer the Court's question.

The Court: Mr. Clasby, you heard the motion of the plaintiff's attorney?

Mr. Clasby: I hate to see anyone deprived of fully producing the evidence they wish and I am sure the Court probably feels the same way, but

the thought occurs to me: how are we going to saddle this woman, who had never been over the road before and who was up there in the dark and in the clouds, with all the knowledge of experts that might be produced by the plaintiff? How was she to know? How was she to know how far ahead there was a grade? So if we permit this testimony to come in, we are buying that kind of a problem, too, and I think we may cloud our thinking by permitting such testimony to come in. We can't impose on her any greater duty than a common prudent person under the same or similar circumstances. We can't impose on her the duty that a truck driver would have that had been over the pass hundreds of times and knew that there was a four-mile hill ahead and ten percent grade ahead and knew that gearing down was essential.

That was the thought I had on it. Other than that I would be the last one in town to resist any [105] attempt by the plaintiff to fully prove his case.

The Court: I am going to grant the motion of the plaintiff to reopen for the purpose of submitting further proof and I am not now ruling, but I think the plaintiff ought to look also into whether or not I can receive evidence on custom in mountain driving in this locality of the accident, and I am aware of the fear expressed by Mr. Clasby, and that is something that I can only take care of in my rulings as we progress, when objections are made, but I wish to give the plaintiff an opportunity to prove its case.

Mr. Johnson, it is now 3:20 in the afternoon. Do you think you could be ready to proceed at ten o'clock tomorrow morning?

Mr. Johnson: I will certainly try to, sir.

The Court: That doesn't give you much time, I realize. I assume, Mr. Clasby, that unless something new is opened up that you don't have any witnesses from far away places that are here in town awaiting this trial. I am wondering if I could allow Mr. Johnson until two o'clock tomorrow afternoon.

Mr. Clasby: I submit to the Court that the only rebuttal testimony that I could at the moment conceive would be pertinent to the testimony that Mr. Johnson is presumably about to introduce would be the testimony of someone who went down that pass on the Valdez side in low gear and did not make it. I can see no other testimony that I could [106] possibly search for that would be pertinent to the issue before the Court that is apt to be raised, so I can't visualize any sur-rebuttal.

The Court: If later you should visualize some and should find you need time to produce it, I will listen to you.

Mr. Clasby: Is the case continued, then, until two o'clock tomorrow?

The Court: Unless you have some particular objection to the two o'clock continuance, I think that would give Mr. Johnson a better opportunity to look into the matter.

Mr. Johnson: Thank you, your Honor.

The Court: Very well, this case, then, is continued until two o'clock tomorrow afternoon.

(Thereupon, at 3:25 p.m., October 10, 1956, the trial of this cause was adjourned, to resume on October 11, 1956.) [107]

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., October 11, 1956, plaintiff and defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding.

The Court: Counsel, at this time I call your attention to the fact that the official court reporter for the Fourth Division has been required to give testimony in Commissioner's Court and is therefore unavailable for reporting this case this morning, and I am wondering whether there is any objection to the official reporter from the Second Division taking this position of reporting?

Mr. Clasby: We have no objection.

Mr. Johnson: We have none.

The Court: Very well. I understand at this time the plaintiff wishes to offer further testimony in its case in chief? Is that correct?

Mr. Johnson: That is correct with this understanding. We asked the indulgence of the Court to put Mrs. Dickerson on the stand at 10:00 a.m. this morning in order to permit her to return to her home, but we have two other witnesses which we would like to produce at 2:00 p.m. this afternoon.

The Court: Mrs. Dickerson, will you please take the stand?

MRS. JOHN T. DICKERSON

took the stand and having previously been sworn, testified as follows: [108]

Direct Examination

Q. (By Mr. Johnson): You are Mrs. John Dickerson, is that correct? A. Yes, sir.

Q. You previously testified in this case?

A. Yes, sir.

Q. At that time you were placed under oath?

A. Yes, sir.

Q. Now you were a passenger in the automobile that was involved in this accident?

A. Yes, sir.

Q. Mrs. Dickerson, I believe it was your previous testimony that you had never been over, or anyone in the car had never been over this particular highway prior to this time. Is that correct?

A. That is correct.

Q. Now, will you describe to the Court the appearance of the country and terrain as you were approaching the point at which you stopped for a prayer meeting. I believe your previous testimony indicates that you did stop and have a short prayer. Is that correct?

A. That is correct, yes; a few minutes before we started down the summit.

Q. Now, will you describe for the Court what you saw as you were approaching this incline. [109]

A. Well, as I said previously, it was a foggy night and we knew that we were going up an incline and we realized after quite a trip, it seemed

(Testimony of Mrs. John T. Dickerson.)

several miles, that we were—well, we had the feeling that we were on top of the world. We could see down below; on the left you could see a chasm or cut side of the mountain, but from our position in the back seat I couldn't see up the road. Of course it was still up a little way and I couldn't see very much for the fog. You could tell we hadn't quite reached the top of the summit. Now speaking from my own visibility, below us you could penetrate the fog with the naked eye but up the road I couldn't see very much. And as we ascended we noticed this mountain which we could see in the distance before we got to this particular mountain on which Thompson's Pass is located.

Q. How did it look as you were approaching it?

A. It didn't look too high. We saw what we thought was a cloud on the top. We didn't know the cloud—the road went up through it. It looked like the top of the mountain with a cloud on top of it but we didn't know the road we were on or that particular mountain either.

Q. However, when you stopped for this prayer, you were on the top of the mountain, or near it?

A. Yes. We had already ascended this mountain which we had seen in the distance. [110]

Q. Now after you held the prayer meeting and you started to proceed toward Valdez, which would be down the mountain——

Mr. Clasby: I object to counsel putting words in the witness' mouth. It has already been testified

(Testimony of Mrs. John T. Dickerson.)
previously several times that they proceeded up after stopping for prayer.

The Court: Yes. I think I will sustain the objection as perhaps confusing the witness.

Q. (By Mr. Johnson): After you started and after the prayer meeting and you commenced to go forward what, if anything, did you hear Mrs. McDonald say during the time that intervened between the time when you started and when you ran off the road?

A. Well, it was her own testimony that she could see after we had stopped there. She said she could see the road and see well enough to drive, and she started off in drive gear. I remember that she had driven in that gear for awhile and in a few minutes we could tell the car started to decline. Of course shortly after we started down, I smelled this burning and I asked her if the car were on fire and she said no, she didn't think so, "it's our hand-brake, I believe." And after a few seconds she convinced us the hand-brake had burned out. I was panicky I must admit and I suggested to her that we jump out of the car and she said "no." She said "you sit down and relax. When I get in this gear we will be all right." But I didn't relax. I guess she thought I would do as she told [111] me, apparently. She only told me that once.

Q. And Mrs. Aronson was in the back seat with you?

A. Yes. I judge she was very much afraid, for she caught my arm, my hand and tried to settle

(Testimony of Mrs. John T. Dickerson.)

me. I could feel her tenseness. She was awfully tense, as I was, and she tried to relax with me in the seat.

Q. And shortly afterwards the accident happened?

A. Well, we continued to descend and I became panicky enough to roll down the window for fresh air. So I made the statement—in ministerial terms I suppose you would say—that "we were all going out into eternity." I said "I am afraid we are all going out into eternity." Mrs. McDonald said "I don't think so" and continued on and shortly after that she said she couldn't get the car into gear and she cut off the switch. We had ample time to discuss a lot of things because it is a matter of three and a half miles down the hill. But after she cut off the switch and said she would free-wheel down the hill we didn't say—I don't remember saying anything else.

Q. And the accident happened shortly after that?

A. That's right. Shortly after that we went over on the side.

Mr. Johnson: That is all. You may cross examine. [112]

Cross Examination

Q. (By Mr. Clasby): You didn't recall, Mrs. Dickerson, making a statement—do you recall making a statement concerning how this accident happened? A. Yes, sir. To you.

(Testimony of Mrs. John T. Dickerson.)

Q. Would you recognize that statement if it were shown to you? A. I think I would.

(A document is handed to the witness.)

A. I haven't read it here in its entirety but I am sure it is.

Q. Do you remember signing it? A. Yes.

Q. Did you read it at the time you signed it?

A. Well, I gave a statement to Mr. Martin and to Mr. Johnson—is this the statement I gave to Mr. Martin?

Q. To Mr. Martin. And did you read it at that time before you signed it?

A. He read it to me I believe. I don't remember reading the statement. I remember he took it in the living room but I don't remember reading the statement.

Q. Now directing your attention to when you stopped at Mile Post 57 and you talked to the garage—to the man there is this a correct statement of what then occurred, "We knew from what the boy said that the worst highway was behind. Someone had told us that we would go through some [113] canyons, I believe Keystone, which had been described as the most beautiful scenery. No one mentioned any mountains or the possibility of them. The fellow at Mile 57 said the nearest garage was at Valdez"? A. Yes.

Q. He did tell you that? I say, is this a correct statement?

A. I have learned since that it was not.

Q. I mean at that time.

(Testimony of Mrs. John T. Dickerson.)

A. Oh. Yes, sir. At that time none of us knew a mountain was ahead—a mountain pass was ahead.

Q. None of you knew a mountain pass was ahead? A. No. We didn't know.

Q. And is this a correct statement, "I don't believe we stopped over seven or eight minutes and then went on"?

A. That is true. Mrs. Aronson——

Q. Would you wait just a minute. I will read a statement back to you and then ask you whether you remember it. "I don't believe we stopped over seven or eight minutes at Mile 57 and then went on. We went what I would judge fifteen miles when we got into the mountains. Right after we left there it began to get foggy. We drove about forty-five minutes at fifteen to twenty miles per hour, twenty at the very most. It was hazy-foggy. It looked like the moon was shining through a thick fog. We had our lights on and we could see what looked like an incline and what looked like fog. We learned later that this was clouds [114] around the peak. We continued to drive slowly and did not stop until we got to Thompson Pass, when we stopped on that high mountain"? Is that correct?

A. Where we stopped for prayer meeting?

Q. No. This whole thing I just read to you—is that correct?

A. Well, it is with the exception of where we stopped there.

(Testimony of Mrs. John T. Dickerson.)

Q. Well, I will come to that in a moment. But on that statement, is that correct?

A. Yes, the statement is correct.

Q. Then is, "We stopped at the top of a mountain, possibly a mile before we got to the top of the hill we crashed. The atmosphere was thick with fog. Mrs. McDonald seemed completely exhausted. We all talked about what we should do. We discussed maybe staying there until the fog lifted. You could just see a bare outline of the road. You couldn't tell what was on either side because of the fog. I suggested that we pray for guidance and we each said a short audible prayer." Is that a correct statement?

A. I have found out since——

Q. I mean as of that time, not what you found out subsequently. But is that a correct statement?

A. It was not a mile from the top but at the time I gave that statement I felt that it was a mile from the top of the mountain. [115]

Q. Then that statement is correct? That I have just given you?

A. Yes. I should have said I couldn't tell what was ahead for the fog. I said "you" couldn't but "I" couldn't.

Q. Now is this statement correct, "We sat there maybe five minutes longer and decided to go on. Day was beginning to break and it seemed a bit clearer. No one raised any objection to continuing on. I don't believe it occurred to us that anything serious might happen. No one expressed any con-

(Testimony of Mrs. John T. Dickerson.)
cern but there seemed to be an atmosphere of uneasiness"?

A. That is a correct statement. Mrs. McDonald suggested going on.

Q. Just answer my question if you would, please. Is that a correct statement?

A. Well, we didn't suggest going on. Mrs. McDonald said she could see and would go on.

Q. Now that might be true, but would you answer first my question. Is what I have just read to you a correct statement, please?

A. At that time?

Q. No, no. I am not trying to jibe what I said with the statement you have in your hand, Mrs. Dickerson, but I will read it off again and I will ask you whether these are actual facts as you recall them, "We sat there maybe five minutes longer and decided to go on. Day was beginning to break [116] and it seemed a bit clearer. No one raised any objection to continuing on. I don't believe it occurred to any of us that anything serious might happen. No one expressed any concern but there seemed to be an atmosphere of uneasiness." Is that correct?

Mr. Johnson: Just a moment, if the Court please. It hasn't been stated by counsel that he is reading from a statement or copy of a statement that Mrs. Dickerson was previously questioned about, and which she has in her hand. I am not sure this is the same statement at all and I think

(Testimony of Mrs. John T. Dickerson.)
that should be determined before we proceed any further.

The Court: I think that is true.

Mr. Clasby: I must ask the question first—is such and such a fact—and if she says it is, what difference does it make? If it is correct in the statement—if she says something is correct—then so is the statement; and if there is something there on which I have a question, which I am not sure is a fact, then I want to inquire. But I must first lay the foundation.

Mr. Johnson: What I am getting at is that he is reading from something, from some paper in his hand. I don't know what that is; whether or not it is a copy of the statement she has in her hands?

The Court: Well, I think the witness has a right to either look at the statement in her hands and follow the questions, or counsel should make it clear that he is reading from a copy of the statement—if she made the statement. [117]

Mr. Clasby: Now if the Court please, I am not at this moment trying to impeach the witness with the statement. At this moment I am trying to find out what the facts are as to her present recollection.

The Court: Well, you have a right to——

Mr. Johnson: We object on the grounds that it is immaterial.

Mr. Clasby: Sometimes you ask a witness is black, black? And the witness says, no, black is white. Then you ask the witness, did you not at a certain time make a statement that black was black,

(Testimony of Mrs. John T. Dickerson.)
and if the witness says no, then you would show the statement.

The Court: You may proceed by asking another question.

Mr. Clasby: I will ask the same question over again.

Q. (By Mr. Clasby): Now then, is this not a correct factual situation, or your testimony as to what the facts actually are, "We sat there maybe five minutes," referring to what you stopped for prayer meeting, "longer, and decided to go on. Day was beginning to break and it seemed a bit clearer. No one raised any objection to continuing on. I don't believe it occurred to any of us that anything serious might happen. No one expressed any concern but there seemed to be an atmosphere of uneasiness." Now if that is correct, say so; if it is not, please explain wherein it is incorrect. [118]

Mr. Johnson: I object on the grounds again that it is something read from any statement she may never have seen before, or which she is ever purported to have made or signed, or may never have sworn to. We don't believe the proper foundation has been laid to ask the question.

Mr. Clasby: I don't believe we should require the witness to testify from the statement but I certainly have no objection to her testifying from the statement. I think in fairness—if it is the same as in the statement, then, fine; if it isn't then the variance can be gone into.

The Court: I see counsel's objection. You might

(Testimony of Mrs. John T. Dickerson.)

go on forever, not confining yourself to something contained in the statement and I don't think anything would be gained by that type of examination.

Mr. Clasby: Well, he has reopened this entire field by this examination of her. I am now cross examining this witness. I can ask her anything that is germane to what he has now reopened by his use of this witness, and I am not going a bit farther.

Mr. Johnson: Maybe I don't understand.

The Court: I will let you repeat it.

Q. (By Mr. Clasby): Let's take it sentence by sentence then. I say to you is it not a fact that "We sat there maybe five minutes longer and decided to go on." [119]

Mr. Johnson: I still object, your Honor, on the grounds that there is nothing showing that he is reading from any statement made by this witness or signed by this witness. If he is reading from some investigator's report, then that is not a proper foundation; no proper foundation has been laid. It would be very simple to say "I am reading from a copy of a statement which the witness has in her hands."

The Court: I am going to sustain the objection as counsel is evidently reading the questions from something. You may ask her any questions you wish pertaining to the facts.

Q. (By Mr. Clasby): I will adopt counsel's theory. Would you refer to the statement in front

(Testimony of Mrs. John T. Dickerson.)

of you. I will try and help you find the page, Mrs. Dickerson.

A. I believe I have it.

Q. You do have it? Then I will ask you this, which I understand appears in that statement. I will ask you, is not the following a part of that statement and is not the following also correct facts, "We sat there maybe five minutes longer and decided to go on. Day was beginning to break and it seemed a bit clearer. No one raised any objection to continuing on. I don't believe it occurred to any of us that anything serious might happen. No one expressed any concern but there seemed to be an atmosphere of uneasiness"?

A. Is this correct or not? [120]

Q. There are two questions: does it appear in the statement you have in front of you, and——

A. It appears in the statement I have here.

Q. And is it a correct statement of fact?

A. If I gave this testimony——

Q. I am not asking you that, Mrs. Dickerson. Please follow my thinking. Is that a correct statement of fact; if it is not, then you may say in what respect it is not correct.

A. Well, it is not correct in that——

Q. All right, please explain.

A. When I gave this testimony, I gave it——

Q. I don't care about when you gave the testimony; I want you to tell me now from your present recollection wherein this statement, the facts I have just read to you, is incorrect.

(Testimony of Mrs. John T. Dickerson.)

A. May I say at this time that I gave the testimony, I gave it as an incorporated body of travelers. I would like to designate who said what, in that we——

Q. That your counsel could take care of on redirect if he chooses. The statement I just read to you, wherein is it incorrect?

A. No one consented to going on. No one raised any special objection or consent; we didn't consent to go on.

Q. Let's go on, Mrs. Dickerson. Directing your attention to the statement in front of you. Do you find this in that statement, "We drove on for maybe [121] a few minutes, possibly a mile, and seemed to be going higher. Then we started down the mountain. Something was said about speed and she was going twenty miles per hour. She said that was her speed then. I don't remember how it was brought about or anything. I think it was in connection with having another hour to reach Valdez at that speed." Is that in the statement?

A. Yes, sir.

Q. Is that a correct statement of fact?

A. That was a correct statement.

Q. Now going on. Is this in the statement, "As she started down, as she had been doing when going down grade, she pulled the emergency about halfway out to check her speed. Then we smelled a burning odor and she pulled it a little more noticing the speed was gaining, and it didn't slow us down

(Testimony of Mrs. John T. Dickerson.)

so she pulled it all the way on." Is that in the statement? A. Yes, it is in there.

Q. Is that a correct statement of fact?

A. As we traveled, as we started down, yes, she did that—after we had gone over the peak.

Q. Then this is a correct statement of fact?

A. Yes, it is correct.

Q. Does this appear in the statement, "We smelled the odor more pronounced. She released the emergency and pulled it on again quickly but it didn't retard our speed." Is that in the statement?

A. Yes, sir.

Q. Is that a correct statement of fact?

A. Yes, sir. She worked on this emergency brake down the hill.

Q. Is this in the statement, "We were going quite fast. I would estimate we were going about forty-five miles per hour by then. She tried to put it in another gear. When we started down the hill we were in drive gear." Is that in the statement?

A. When we came over the top and started down she was in drive. Yes, it is a correct statement of fact.

Q. Is that in the statement?

A. Yes, it is a correct statement of fact. Well, when we came over the top she was in drive gear and when we first started down, yes.

Q. Well is the rest of it correct, "We were going quite fact. I would estimate we were going about 45 miles per hour by then. She tried to put it in another gear." Is that also correct?

(Testimony of Mrs. John T. Dickerson.)

A. Yes, it is correct. She got into neutral—from drive gear into neutral.

Q. Now is this in the statement, "When she tried to shift into low or whatever other gear those automatics have, it just growled and scraped. It would not go in." Is that in the statement? [123]

A. Yes, sir.

Q. Is that a correct statement of fact?

A. Yes, it is correct statement of fact, with the insertion that we were in neutral at the time.

Q. Please don't insert anything. I merely want to know if it is correct or incorrect. If it is incorrect I want you to tell me but I don't want you to volunteer anything further. Now going on, is this in the statement, "She said maybe I can get it in reverse. She seemed quite calm, not unduly excited. She kept working the gear lever and kept working on the hand brake all the time, and keeping the car on the road. We were going around some curves, and downhill too." Is that in the statement? A. Yes, it is in the statement.

Q. Is that a correct statement of fact?

A. Yes. It is not a straight road down the mountainside.

Q. Now is that in the statement, "She kept control of the car until we gathered high speed and she said she would switch the motor off when I said it smelled like the car was burning." Is that in the statement?

A. Yes, it is in the statement.

Q. Is that a correct statement of fact?

(Testimony of Mrs. John T. Dickerson.)

A. When I told her the car smelled as if it were burning it was farther up the road. That odor continued—was in the car all the way down.

Q. Is this in the statement, "She said she didn't think the car was burning. I suggested maybe we could jump out and Mrs. Hall and Mrs. Aronson said not to get excited." Is that in the statement?

A. Yes.

Q. Is that a correct statement of fact?

A. Mrs. McDonald told me not to get excited too, and that was the one I remembered because she told us if she got it in gear we would be all right.

Q. Do you not recall Mrs. Aronson telling you the same thing?

A. Earlier in that ride down when she was clasping my arm she could have told me not to get excited.

Q. And your memory at the time you made that statement may have been a little clearer than now.

A. On this particular—on this it could, yes.

Q. Now is this in the statement, "The car continued to gain headway. We were coming out of the fog. I rolled my window down for air. We left the road." Is that in the statement?

A. Yes, sir.

Q. Is that a correct statement of fact?

A. Yes, sir, that is true.

Mr. Clasby: No other questions. [125]

(Testimony of Mrs. John T. Dickerson.)

Redirect Examination

Q. (By Mr. Johnson): In some portions of the statement that counsel has been questioning you about, you used the pronoun "we." Will you explain that a little bit more fully.

A. Well, when I gave this statement to Mr. Martin, I gave——

Q. Incidentally, is Mr. Martin an investigator?

Mr. Clasby: I object, as to its being irrelevant and immaterial who Mr. Martin is.

The Court: Objection sustained.

Q. (By Mr. Johnson): Where did you give this statement by the way?

A. In the living room, shortly after the accident occurred; very soon afterward I returned from Valdez, which was Friday after the accident.

Q. Were you still incapacitated after the accident? A. Yes. I was still in bed.

Q. In whose handwriting was that statement?

A. It was not in mine. It seems to have been in the insurance adjuster's, Mr. Martin's.

Mr. Clasby: I ask that the answer be stricken and I am almost in mind to move for a mistrial. Mrs. Dickerson must not volunteer any statements. She can get everybody in hot water. Does the Court [126] feel he can disregard that statement completely.

The Court: I am sure I can disregard the last part of it. I can't expect Mrs. Dickerson to know the technical workings of the law but I will disregard the entire last part of the statement.

(Testimony of Mrs. John T. Dickerson.)

Q. (By Mr. Johnson): Now, just confining yourself strictly to the statement, did you read the statement after it was prepared and before you signed it? Do you recall?

A. No, this is my first recollection of reading this statement. I believe that it was read to me.

Q. Do you have no recollection of reading it yourself? A. No—no.

Q. Now, when you used the pronoun "we" with reference to a statement concerning what "we" did, will you explain that a little more fully.

A. Yes, I can. I just took it as a traveling party and I didn't designate who said what. I just said "we" because we were traveling together, at the time I gave the statement.

Q. Now, have you a vivid recollection of everything that happened on that accident on the mountainside?

A. Yes, I have, and I have no contradiction with what I said but I could clarify, I believe, which one of us did what in that "we."

Q. Well, that is what I want you to do.

A. We stopped there; I asked to stop as we [127] went up the hill. We had the prayer meeting and Mrs. McDonald suggested going on; that she could see. We didn't consent to go on but, as I said, we didn't object. The objection, to me, had been made much earlier and we were afraid——

Mr. Clasby: If the Court please, in the first place this is cumulative and in the second place it is dangerous to turn the witness loose on such an

(Testimony of Mrs. John T. Dickerson.)

extremely broad question, and without knowing what is coming afterward it can cause many difficulties. I think she should be confined to specific questions.

The Court: I believe that is true, Mr. Clasby, and possibly that Mr. Johnson, if he wishes to pursue it further, should have the statement that was shown to the witness.

Mr. Clasby: I am very happy to let him have it.

Mr. Johnson: The widest latitude was granted counsel when he was having two men describe Thompson Pass. I see no reason why we shouldn't be allowed a little latitude.

The Court: Well, I am not trying to limit your latitude unnecessarily, but when she is asked to explain who she meant by "we" in the statement—perhaps she has used "we" many times. I don't know which "we" you are referring to. I don't think the witness could probably know. It is a very general question and too general to permit, I think, an answer.

Q. (By Mr. Johnson): Now, Mrs. Dickerson, calling your attention to the bottom paragraph on that particular page—the page isn't numbered—[128] but it is that portion of the statement relating to stopping at the mountain top and about which counsel has questioned you, and you used the pronoun "we" in one or two places. Will you explain to the Court what you had in mind or who you meant by "we," just what you meant if you can recall.

(Testimony of Mrs. John T. Dickerson.)

Mr. Clasby: If the Court please, we object to that. If counsel wants to read a sentence from the statement so I have some knowledge of what he is asking the witness——

The Court: Well, I am afraid the record would never reflect what page he is looking at. I am now thinking of a little theory I have had for some time. I have found no support from members of the bar in my theory but I have always felt that when a witness is shown a document and asked questions about it, that it be identified at that time. Now this illustrates why. Had Mr. Clasby had it identified—if he had had it identified, then Mr. Johnson could very easily, without asking a lot of questions, ask is this the same statement Mr. Clasby showed the witness. Now we must go into all that again. If it were identified you could merely refer to the identification and page and you could read from it and we would have a good record, but that hasn't been done.

Mr. Johnson: With permission of the Court, I would like to have it marked for identification.

Mr. Clasby: I have no objection to marking it for identification. It has always been my understanding that you don't have [129] it identified or use it as an impeaching document unless the foundation has been laid for impeachment. I don't see—I am doubtful if this is relevant even unless he proceeds to——

The Court: I am not sure of that but I just say that it seems to me to be better practice, and I am

(Testimony of Mrs. John T. Dickerson.)

not sure of my ground, that whenever something is shown a witness that it be identified. Maybe that is wrong but it seems to me that way we have a good record. In other words if a witness is shown something and counsel takes it back to his files, we have no way of knowing, without a great many questions, whether it is the same instrument as was previously shown to the witness or not, whether it's the definite instrument. But without deciding for all further time, at least at this time the paper will be identified.

Clerk of Court: Will this be plaintiff's or defendant's identification.

Mr. Johnson: Plaintiff's——

Clerk of Court: This will take plaintiff's identification No. 4.

Mr. Clasby: Now that he has the document to refer to, I believe he should read the sentences from it——

The Court: Yes, unless counsel stipulate—I suppose the witness can tell us whether or not that is the same document that was shown to her by Mr. Clasby.

Mr. Clasby: I think the witness can testify to that.

The Court: Yes, I say that maybe he will have to question her about that. [130]

Q. (By Mr. Johnson): Mrs. Dickerson, I will show you plaintiff's identification No. 4 and will ask you if that is the document from which you test-

(Testimony of Mrs. John T. Dickerson.)

ified previously when Mr. Clasby was questioning you? A. Yes, sir.

Q. And that is the same one, is it, and contains your signature? A. Yes, sir.

Q. But it is not in your handwriting?

A. No, sir.

Q. Now looking at the fourth page from the back, will you look at the bottom paragraph, and is that the paragraph that you talked about previously?

A. Yes, sir, "We stopped at the top of a mountain."

Q. Now I will read from this paragraph—page 10 of plaintiff's identification No. 4—this statement appears, "We stopped at the top of a mountain, possibly a mile before we got to the top of the hill we crashed on. The atmosphere was thick with fog. Mrs. McDonald seemed completely exhausted. We all talked about what we should do. We discussed maybe staying there until the fog lifted. You could just see a bare outline of the road. You couldn't tell what was on either side because of the fog. I suggested that we pray for guidance and we each said a short audible prayer." Now you have used the pronoun "we." For instance you say "We all talked about what we should do." Can [131] you explain that a little more fully.

A. Well, we didn't all make each suggestion. I could identify the person making the statement, but when I gave the statement, "we" included the whole traveling party.

(Testimony of Mrs. John T. Dickerson.)

Q. And will you explain exactly who made what statements?

A. Yes. I asked to stop and wait until the fog lifted and we did stop at that place for a few moments and had prayer, and Mrs. McDonald said she could see. She felt the fog had lifted and we could go on. We didn't object but we didn't consent.

Q. But there was nothing other than the statement made about it by you and Mrs. McDonald.

A. No, sir. Only that statement made about going on.

Q. Do you recall now any other statement which may have been made by Mrs. McDonald, other than those you have related as you went down the hill.

A. I have related the conversation about the emergency brake burning, how it smelled and about how she consoled me with the fact that when she got it in gear we would be all right to go down the hill, and then about turning off the switch key, and about not facing eternity—which is the way I put it that night. Those are the bits of conversation that I recall were made.

Mr. Johnson: That is all.

Recross Examination

Q. (By Mr. Clasby): Now, Mrs. Dickerson, I am confused again. A moment ago when I was examaning you I understood this statement to be facts according to what you told me, "We all talked about what we should do." Now, as I understand your

(Testimony of Mrs. John T. Dickerson.)
testimony in redirect by Mr. Johnson, all that was said was that you asked that the car be stopped and Mrs. McDonald said, I think I will go on?

A. No. We stopped—I asked to stop. We all had prayer. Each one prayed audibly.

Q. Now, let's come back. And please pay attention to what I read you before, Mrs. Dickerson, to this statement that you told me was correct, "We all talked about what we should do?"

A. Well, I remember our prayers about it, but I asked to stop and we prayed about the trip, each one audibly and then she suggested the fog had lifted and she could see and we could go on.

Q. Then this statement is incorrect—you didn't all talk about what you should do?

A. I am trying to recall.

Q. Did young Bobby enter into the discussion of what you should do? Whether you should stay and wait awhile more or go ahead, the condition of the fog or the road? Did he enter into the discussion?

A. I don't recall any other conversation concerning that but my request to stop, our prayer—I suggested that we pray for guidance on the trip—we all prayed, each one audibly, and then [133] the decision of Mrs. McDonald, saying she could see and we would continue on. As I said before, when I gave that statement "we" I didn't try to identify each person who said what.

Q. Now, Mrs. Dickerson, is this your present sworn statement, that there was no discussion

(Testimony of Mrs. John T. Dickerson.)
amongst the people in that car at the time that it was stopped as to what should be done?

A. Well, I am interested in telling the truth, but I don't recall——

Q. Then answer me—is that your testimony, that there was no such discussion?

A. As to what should be done—there was nothing to discuss at that point.

Q. That is begging the question, Mrs. Dickerson. I want you to answer my question, if you please. Is it not now your sworn testimony that there was no discussion among the members of the party at the time you stopped on the mountain as to what should be done?

Q. Concerning what should be done, whether to go on,—the brake to be fixed—does that enter into the discussion?

A. We didn't discuss whether we should go on after stopping and talking with the man——

Q. No, whether the people in that party at the time they were stopped on the mountain had a conversation between themselves relating to what they should do.

Mr. Johnson: I object on the grounds that he is arguing [134] with the witness. It seems to me the question has been answered before several times.

The Court: Well I think, Mrs. Dickerson, if you will just be calm and listen to the question and answer it to the best of your ability, and if you don't understand the question, say so.

Mrs. Dickerson: I don't quite understand if my

(Testimony of Mrs. John T. Dickerson.)

explanation of saying "we" all the way through that is correct or not.

Q. (By Mr. Clasby): Let's approach it this way, Mrs. Dickerson. You did tell Mr. Martin "We all talked about what we should do," did you not?

A. Apparently, from my testimony. I recall that we——

Q. And that was just a few days after the accident occurred? A. Yes, very shortly afterward.

Q. And your memory at that time was fresher, was it not? A. Well, I was——

Q. Now, just answer my question, if you would, please, and then you can——

Mr. Johnson: I think she has a right to explain an answer of that kind.

The Court: At the same time I think we would get along better if Mrs. Dickerson confined her answers just to the question. Mrs. Dickerson, answer it as honestly as you can and if you don't understand, just say that, and please try to answer yes or no. [135]

A. Yes, my memory was relatively fresh at that time.

Q. (By Mr. Clasby): And is it probable that your memory at that time was better than your memory today, and fresher?

A. Yes. It is probable that my memory was fresher then but I was giving—I was not identifying the ones making the conversation.

Q. Then is it more apt to be correct that your statement then "We all talked about what we should

(Testimony of Mrs. John T. Dickerson.)

do," is more apt to be correct than your testimony now that the only things that occurred were that you asked that the car be stopped and Mrs. McDonald later said, "I think we can go on, and that is all of the discussion that took place relating to what we should do?"

A. Well, I have difficulty remembering now--I was think about all the absolute details, whether anyone else said anything, but the primary remarks that were made were those two and our prayers.

Q. Now, I am trying to ask you—I don't intend to ask you what any person may have said—all I want to do is determine whether or not you people did, as a group among yourselves, discuss what to do at the top of the mountain.

A. Relative to staying there?

Q. What the discussion was concerning or what my question was concerning.

A. It didn't involve the brake fixing or anything, just [136] stopping there.

Q. The discussion would be as to whether to proceed or not. A. At that moment, yes.

Q. Then there was such a discussion?

A. As I said—I will take for granted that my memory was fresher at the time of that testimony than it is now about who said what—but I clearly remember those two remarks that were made.

Q. But there could have been other remarks made you now have no memory of, relating to going forward.

(Testimony of Mrs. John T. Dickerson.)

A. Not convincing remarks or important things that were said.

Q. Well, if you can't recall what was said how can you recall whether it was important or not.

A. Each time anything was brought up, the one who made the conclusive statement was the thing we did, as in this instance I requested to stop and she stopped, although I don't recall now whether anyone else discussed it. But I remember the convincing thing that was said. I requested to stop and we did stop.

Q. I am having a bit of trouble again following you. What I am trying to get at fundamentally is, is it your testimony that you cannot recall now things that people may have said and the reason is that they are not important? [137]

A. That is true, or at least the suggestion that was obeyed. What I am trying to say is that I remember well who made the suggestion that we went by.

Q. There may have been other suggestions made that you now have no memory of.

A. Well, there could have been some suggestions that I have no memory of, yes.

Q. Between Mile 57 and the place where you stopped at the top of this summit, did it at any time occur to you that Mrs. McDonald in operating the car should do something different than what she was then doing?

A. From the time we stopped and asked the garage man to the top of the summit?

(Testimony of Mrs. John T. Dickerson.)

Q. Yes. A. Not being familiar——

Q. I am not asking you that. Please listen closely to my question again, Mrs. Dickerson. Did it occur to you as a passenger riding in that car at any time from 57 mile to the place where you stopped at the top of the summit, that the driver should be doing something different in the operation of the car than the driver was doing? A. Yes.

Q. Did you say so to the other passengers or to Mrs. McDonald that which occurred to you?

A. No, not to direct her driving. [138]

Q. That is all I want to know. You didn't say it.

Q. (By Mr. Johnson): You didn't have any difficulty until you started down Thompson's pass anyway, did you? A. No—but——

Mr. Clasby: Please don't volunteer statements.

Mr. Johnson: That is right. Mrs. Dickerson, just take it easy don't let counsel get you rattled. That is what he is trying to do. Now with reference to this conversation that you had at the time you stopped at the top of the hill—counsel has attempted to confuse you with respect to your memory of that conversation—I believe, however, your testimony is that you remember the statements that were made that were followed? Is that correct?

Mr. Clasby: I move that that question be stricken. Counsel himself was testifying. He was not asking any questions of the witness—and this is sur—direct or whatever you might call it.

The Court: Yes, I feel obliged to strike the question.

(Testimony of Mrs. John T. Dickerson.)

Mr. Johnson: That is all, then. Thank you very much.

The Court: Now I understand that you have no further testimony until 2:00 this afternoon.

Mr. Johnson: Yes. [139]

Mr. Clasby: That is right.

The Court: Mr. Hall, do you have anything at 1:30?

Clerk of Court: No, sir.

The Court: Very well. This case will be recessed until 2:00 this afternoon and court will recess until 2:00 p.m.

(Thereupon, at 11 a.m., a recess was taken until 2:00 p.m., October 11, 1956.) [140]

Afternoon Session

(The trial of this cause was resumed at 2:00, pursuant to the noon recess.)

Clerk of Court: Court has reconvened.

The Court: Are counsel and the parties ready to proceed?

Mr. Johnson: The plaintiff is ready, your Honor.

Mr. Clasby: We are ready.

The Court: Very well.

Mr. Johnson: I would like to call Mr. Jim Hutchison, please.

JAMES HUTCHISON

a witness previously called and sworn, was recalled by the plaintiff as a rebuttal witness for the plaintiff, and testified as follows:

(Testimony of James Hutchison.)

Direct Examination

Q. (By Mr. Johnson): You are James Hutchison, Jr., is that correct? A. I am.

Q. You have previously testified in this case, I believe? A. I have.

Q. As a witness for the defendant?

A. Right.

Q. You now have appeared here under subpoena as a witness for the plaintiff; is that correct?

A. That is right.

Q. You are connected with Fairbanks Motors?

A. I am.

Q. And have been for a number of years?

A. Yes.

Q. Does the Fairbanks Motors sell Dodge automobiles? A. Yes, they did.

Q. Were they selling Dodge automobiles in 1953? A. Yes.

Q. And for a number of years before that and since? A. Yes.

Q. Are you familiar with the 1953 model Dodge Coronet sedan? A. Yes, I am.

Q. With the gyro-torgue transmission?

A. Yes.

Q. Have you ever driven a car of that type?

A. Yes.

Q. And I believe you testified previously that you had made repairs on that type of transmission from time to time? A. Yes, sir.

Q. Are you familiar with the general area known as Thompson Pass on the Richardson Highway?

(Testimony of James Hutchison.)

A. Yes, I am.

Q. Have you driven over that Pass?

A. Yes.

Q. Have you ever driven over it with a 1953 Dodge? [142] A. No, sir.

Q. Have you ever driven over that Pass with a car that had a similar transmission?

A. No, sir; I haven't.

Q. From your general knowledge of the operation and mechanism of a gyro-torgue transmission, are you able to tell the Court how that type of transmission would operate on a long descent or a long, winding hill?

A. Yes; that transmission, unless——

Mr. Clasby: Just a moment. You have answered the question "Yes." That completes the answer. I would like to have a new question before you go further.

Q. (By Mr. Johnson): Now, will you describe to the Court the type of brakes that the ordinary 1953 Dodge Sedan Coronet model had on it, if you recall?

A. They were four-wheel hydraulic made by Lockheed.

Q. How were they operated?

A. They were operated by a foot pedal and a master cylinder.

Q. And you say they were hydraulic?

A. They are hydraulic, right.

Q. What, if anything, would result to that brake

(Testimony of James Hutchison.)

if that master cylinder or the brakeline containing the fluid should be broken? [143]

A. It would lose all braking power.

Q. What would cause that?

A. The fluid would escape through that brakeline by application of the master cylinder through the foot pedal.

Q. Then, that would leave the automobile without foot brakes? A. That is right.

Q. What other type of brake did that automobile have?

A. Self-energizing emergency brake actuated by a control lever in the operator's compartment, or the driver's seat.

Q. Where was that lever located?

A. On the 1953 Dodge it was located right down on your left side, right on the lower part of the instrument panel.

Q. Would that be to the left of the steering column? A. Yes.

Q. You say that is a self-energizing brake. Will you explain what that means?

A. When you apply the brake, when you pull the brake handle, it throws a shoe out against the drum, which again throws another shoe against the drum on the other side. One shoe energizes the other.

Q. Where do these shoes come together?

A. There is a drum.

Q. What part of the automobile?

A. There is a drum fastened to the drive shaft

(Testimony of James Hutchison.)

right behind [144] the transmission and those shoes are inside of that.

Q. So that the emergency brake or hand brake operates on just one drum, instead of all four wheels?

A. That is right, it operates on the drive shaft.

Q. Does that operate separately from the other brakes entirely? A. Yes, entirely.

Q. From your experience in driving a 1953 Dodge, are you able to tell the Court what effect it would have on the speed of descent if you started down an incline with a car in second or driving range?

Mr. Cole: We object to that.

Mr. Clasby: Are you able to tell, is the question—yes or no.

The Witness: Will you state that again, please?

The Court: We will have the question read by the reporter, please.

(Thereupon, the reporter read the last question.)

A. I would think the effect would be——

Mr. Clasby: No, you are not supposed to tell the effect but whether you are able to.

The Court: Whether you are able to—yes or no.

A. Yes. Let's put it that way.

Q. (By Mr. Johnson): Will you explain to the Court what would be the effect [145] of such an operation?

Mr. Clasby: To which we object, if the Court please, as calling for a conclusion of this witness,

(Testimony of James Hutchison.)

not in the manner of giving expert testimony relating to the facts in this case; no hypothetical question has been posed to him; we can't see the relevancy at this time to an answer to this type of question, nor can we see that a foundation has been laid in conformance with the issues before the Court.

The Court: I think the question is too indefinite to give an answer of value to me at this time, so I will sustain the objection.

Q. (By Mr. Johnson): Assume that you were at the top of a rather high elevation, such as Thompson Pass, but you might not know it; assume that you were driving a 1953 Dodge Coronet sedan with gyro-torgue transmission, and assume that the fluid line on the foot brakes had broken and you had no foot brakes, but assume that you knew that you were about to descend; do you have an opinion from that state of facts as to what should be done before starting down?

Mr. Clasby: To which we object, if the Court please. The obvious answer would be to stop right there. It is supplanting this witness' judgment for the Court's judgment, and it is not relevant to the question that the court has under consideration. It is not a matter of giving expert testimony as to what the [146] laws of nature as applied to the mechanism involved here might accomplish under a given set of circumstances, injecting an opinion that we feel is immaterial and useless to the Court, and resolves the question before the Court.

(Testimony of James Hutchison.)

The Court: I will permit the answer.

Mr. Johnson: You may answer the question. Will you read it again, please?

Mr. Cole: If the Court please, may I make one statement?

The Court: I would like to have counsel decide which counsel is going to offer the objections.

Mr. Clasby: I will offer the objections, and I have made my objection thoroughly, and I think the Court understands most of it except there is an element here that is not helpful to the Court. This witness is not told what the rate of descent is or how long the descent is that is facing him. There are so many factors that any answer the witness gives to the question as it stands right now, I can't see where it would be helpful to us.

The Court: I thought maybe the witness would think the question insufficient to give an answer to, but he said he can. He may answer.

A. If the person operating the vehicle knew he had no brakes and he wanted to descend this hill, the obvious thing to be done would be to proceed down in lower gear—as low gear as you could get, and if the speed developed to where you would lose control, I would hit for the ditch. [147]

Mr. Clasby: I move that the last part of the answer be stricken, if it should appear to the Court that there is an attempt in the manner to prove some kind of custom.

The Court: I will strike that portion, "I would hit for the ditch."

(Testimony of James Hutchison.)

Q. (By Mr. Johnson): Do you have an opinion as to whether or not a car of this type under the circumstances explained could be kept under control by using the driving range or driving gear in descending as well as using the hand brake occasionally?

Mr. Clasby: To which we object, if the Court please. Descending what? We haven't got any question before us that has any pertinency to this case at all.

The Court: Sustained.

Mr. Johnson: Descending a hill such as Thompson Pass.

Mr. Clasby: To which we object, if the Court please. It is indulging in conjecture, has no relation to the issues in this case. We are concerned here with a specific automobile and specific circumstances on a specific stretch of highway, not what this automobile might or might not do on a similar road somewhere else.

Mr. Johnson: I asked him about going down Thompson Pass.

The Court: I am going to ask counsel to rephrase the question. [148]

Q. (By Mr. Johnson): Assume that you were about to descend Thompson Pass with a car of this type and model in the condition as described. Do you have an opinion as to whether or not you could descend Thompson Pass and keep the car in control by placing it in second gear or in driving gear and using the handbrake occasionally?

(Testimony of James Hutchison.)

Mr. Clasby: To which we object, if the Court please, posing to this witness a hypothetical question without clearly qualifying this witness as an expert to give an answer thereto, and embracing within this question all the circumstances that should be embraced in that type of question. I could itemize them but I believe they are so obvious to the Court, I am not required to as a part of the objection, but if the Court wants me to, I will.

The Court: I would like to have that spelled out.

Mr. Clasby: In the first place, the time of the year is not specified, the condition of the roadway is not specified, the condition of the weather as to fog is not specified, the condition as to whether it is night or day is not specified, the hours of driving the driver had to this date is not specified, the fact that the driver had never been over the mountains and did not know where they were is not specified, the use of the hand brake for some 30 miles before they reached the top of Thompson Pass and the condition ensuing therefrom is not [149] specified. We are left to conjecture as to what the witness had in mind when he answered the question.

The Court: I will have the question read, please.

(Thereupon the reporter read the last question.)

The Court: I will permit the answer.

A. Yes, that could be done. I believe it could be done. I know I could do it.

Q. (By Mr. Johnson): Could an ordinary driver do it?

(Testimony of James Hutchison.)

A. I believe an ordinary driver could——

Mr. Clasby: Just a moment. We object to that, if the Court please, again calling for a conclusion of this witness. No showing he is an expert, no showing he has observed ordinary drivers, no showing how many times he has driven over this Pass, no showing how long ago he has driven over this Pass, no showing he has ever been over it in the condition it is in now, too many variables that have not been taken into account.

The Court: I think there is some merit to the objection, but I will let the answer stand.

Mr. Clasby: I didn't get the answer, but if there was one I will move it be stricken on the same grounds.

Would the reporter read the answer to me, please?

(Thereupon the reporter read the last answer.)

The Court: You may complete the answer.

A. (Continuing): I believe that an ordinary driver could [150] descend that Pass safely under control if he was on the ball and knew what he was doing. He could follow the procedure of dropping the gear, applying emergency brakes sparingly, and following the shoulder of the road, the soft shoulder, and staying in that as much as possible.

Mr. Johnson: You may cross-examine.

Mr. Clasby: If the Court please, at this moment I would like to know if counsel is, by this answer, injecting into this case an issue beyond the pleadings, an issue never mentioned until this moment, a

(Testimony of James Hutchison.)

new and complete and different thing, that is to say, that this woman was negligent because she failed to drive on the shoulder of the road. If that is true, I am going to object, and I am going to object to the answer of the witness standing as evidence in this case, and ask it be stricken because it is based on something that is not in issue in this case, and I am going to object to it being brought into this case as an issue at this late date. We have been following a devious trail trying to find evidence and we are not going to inject a brand-new issue.

Mr. Johnson: Maybe we have been following a devious path, but just the same counsel is as much guilty as I am of that, and he has been using dilatory tactics. I am trying to point out by this witness exactly what could have been done upon that highway. The Court will remember that the testimony demonstrates very clearly that she drove on the outside sometimes [151] and sometimes on the inside of those curves going down that hill. That is the testimony in the record and it is undisputed. Certainly this is within the scope of the pleadings and all of the previous proof.

Mr. Clasby: It is not. It is a brand-new issue of negligence — brand-new. There has never been the slightest indication in the pleadings, in the brief, or any of the testimony to this point that counsel had any thought in mind of charging this driver with negligence by reason of a failure to drive on the soft shoulder of the road in assisting her in keeping

(Testimony of James Hutchison.)

the car under control. I have been surprised enough by the other issues, but this one is intolerable.

The Court: What is before the Court?

Mr. Clasby: My motion is to strike the entire answer because it is based on the injection of a new fact that is not in issue in this case. The whole foundation of the answer falls.

The Court: The motion will be denied and we will proceed. It seems obvious to me, and I decline to comment, and I wouldn't if it were a jury case, but it seems obvious to me that the witness has injected a lot of things that might have been done by the driver that are not within the testimony of this case, and I don't see how that is detrimental to the defendant, but you may proceed. The direct-examination had ceased.

Cross Examination

Q. (By Mr. Cole): Jim, you have already testified that you are familiar [152] with how the transmission on a 1953 Dodge Coronet, which is a gyro-torque transmission, operates, have you not?

A. Yes, sir.

Q. I just want to establish once again, go over it sort of clearly, as to how it works and what the gear ratios and the two gear shift positions are, how many gear shift positions there are with the gear level?

A. Including reverse, there are three.

Q. And how many forward?

A. Two gears you can shift for forward speeds.

(Testimony of James Hutchison.)

Q. How many speeds are there in each one of those? A. Two speeds in each gear.

Q. What is the lowest ratio called?

A. They call that your power gear when you are starting out.

Q. What is the highest gear ratio called?

A. That is your driving gear.

Q. And you say there are two speeds in each gear? A. That is right.

Q. That gives you a total of four forward gear speeds? A. That is right.

Q. If you were driving this automobile and descending down an incline, would you have any compression on the motor when the car was in the first gear speed?

A. It all depends on the speed. You would have above [153] six miles per hour.

Q. Would you have any compression in second gear speed?

A. Your second gear speed is the speed that the transmission shifts up to from the first speed. That is, the shift lever is in the first gear or low gear. Above six miles per hour it will automatically shift up into second gear, second speed.

Q. Would you have any compression if the car were in third gear speed?

A. No, unless the transmission had upshifted and you had obtained a speed of roughly 12 to 13 miles an hour.

Q. If the car were actually power flowing through the first gear speed system of gears, would

(Testimony of James Hutchison.)

you have any compression, and you haven't shifted into second?

A. If you stay below six miles per hour, you will stay in the first gear speed; you will not have any compression.

Q. That is right. When the car goes into the second gear speed power flow through that system of gears, do you have any compression there?

A. You mean if the thing upshifts?

Q. Yes, into second.

A. Yes, you have compression then.

Q. If you have the gear lever in the drive position and it is in the lower system of gears than the drive system, do you have any compression in third gear?

A. You don't have any compression until it upshifts. [154]

Q. Into fourth gear? A. Into fourth gear.

Q. And you have compression in the fourth speed? A. That is right.

Q. So summing up your testimony, the only gear speeds, the power system of gears, in which you have compression, is when the automobile is in the second-gear speed and in the fourth-gear speed?

A. That is right.

Q. I just wanted to establish that to clarify the operation of the transmission.

How fast or what possible speeds would it be possible to attain when the automobile was in the second-gear system, if you were rolling down an incline of approximately eight percent?

(Testimony of James Hutchison.)

A. I would estimate at full engine RPM, you would probably have 70 or 75 miles per hour coasting.

Q. If you were traveling down an incline in a 1953 Dodge with a gyro-torque transmission, a grade which averaged approximately seven percent, and traveled down that grade in second gear between about four and five miles an hour, could you give an estimate of the speed which the vehicle would attain?

A. No, I couldn't. There is no way you could estimate that.

Q. You don't have any idea?

A. No, I haven't any idea. [155]

Mr. Johnson: May I have that question read to me? I didn't quite get it.

The Court: Certainly.

(Thereupon the reporter read the next to the last question and the answer.)

Q. (By Mr. Cole): Just one other thing, involving the power flow from the motor to the rear wheels of a 1953 Dodge Coronet, how does the power actually flow from the piston to the rear wheels? Could you just go through that? I don't mean in great detail, I mean in just broad terms.

A. Yes. The power flows through the torque converter or fluid drive, through the clutch. There is a clutch lever — and through the transmission, through the differential to the wheels.

Q. From the crank shaft of the motor, it goes

(Testimony of James Hutchison.)

through a fluid drive unit and through the transmission and then to the rear wheels? A. Right.

Q. Would you describe just briefly what that fluid drive unit contains?

A. It is what they call stators. They look like veins like on a turbine, when they are facing one another, and this unit is filled with oil, and these stators, the front one is fastened to the crankshaft, throws the oil to the back side of [156] the fluid drive, which transmits power to the transmission.

Q. So there is actually no mechanical transmission between the front part of the fluid drive unit and the rear part of the fluid drive unit?

A. No. It is oil.

Q. All that there is between that is oil?

A. That is right.

Q. And the power is transmitted through the rotation of the front runners, so to speak?

A. Yes.

Q. And to the rear one, and from there goes into the transmission? A. That is right.

Q. And there is only braking force in that transmission when the car is in second gear and the fourth gear? A. That is right.

Q. So in order to have any braking force from the motor perceptibly you would have to have the car in the second gear?

A. That is right; it has to be in second gear.

Q. Otherwise, you have absolutely no braking force from your motor? A. That is right.

Mr. Clasby: That is all. [157]

(Testimony of James Hutchison.)

Redirect Examination

Q. (By Mr. Johnson): Jim, I believe you stated that in this transmission unit where these two plates—I think you called them stator plates—do they set in the unit opposite each other; is that right? A. That is right.

Q. And they are enclosed in a housing which is filled with oil; is that right? A. That is right.

Q. When the unit engages, what, if anything, happens as far as these stator plates are concerned?

A. When the engine builds up a certain amount of RPM's, the oil more or less becomes solid. It is a solid unit. It acts as a direct unit, riding coupling, between the engine and the transmission.

Q. Then, as I understand it, these two stator plates do not move toward one another; is that right? A. They are stationary.

Q. Then, it is simply the speed of the engine which tends to solidify this oil; is that right?

A. That is right, just like an oil pump.

Q. What, if anything, does that do with respect to holding back the whole mechanism?

A. It works in reverse just the same way as it would going [158] ahead. The oil still solidifies and is locked up in there.

Q. When it is locked, then it is unable to move; is that correct? A. That is right.

Q. And it reduces the speed of the drive shaft to that extent, or what happens?

A. A direct coupling between the transmission and engine—it is solid.

(Testimony of James Hutchison.)

Q. Now, when you answered a question asked by Mr. Cole you stated, I believe, that you had braking action in this transmission only when it was in second and fourth speeds; is that right?

A. That is right.

Q. However, if you start out in, let us say, first speed by putting the gear shift handle up, how long and what happens before you proceed from first speed to second speed?

A. It all depends on the speed developed by the car, how fast you are driving and how fast you apply, how much throttle pressure you apply to build up speed. It only takes six miles per hour to shift that transmission into second speed.

Q. If you started from a stand-still you would be in first gear until you reached a speed of six miles an hour? A. That is right.

Q. After you reached that speed of six miles an hour, is there any way of advancing it to third speed without the use of [159] the clutch pedal?

A. In some cases it would me possible.

Q. What is the normal procedure?

A. The normal procedure is to depress the clutch pedal and pull the lever down into the third speed.

Q. How long have you been driving a car or an automobile?

Mr. Clasby: We object. That is going way beyond redirect-examination.

The Court: I think it is true, but I will permit the answer.

(Testimony of James Hutchison.)

A. Well, I have been driving since I was twelve years old.

Q. (By Mr. Johnson): How many years would that be, roughly? A. Let's see—23.

Q. About 23 years? A. That is right, sir.

Q. If you were driving in a 1953 Dodge sedan of the type and condition as we have in this case and you reached the summit of a high incline and were about to descend and not knowing whether it was steep or anything about the conditions, and if you should approach such a spot at night when it was dark and the fog or clouds were hanging around the area obscuring the vision considerably, but nevertheless knowing that you were about to descend some sort of a road, that the road was covered with asphalt, was dry, what in your opinion, as an experienced driver, [160] would an ordinarily prudent person do before descending on such a road?

Mr. Clasby: If the Court please, that is objectionable for several reasons. The last one, a reasonably prudent person, that is up to the Court to decide. First, it is improper redirect-examination, no permission has been asked by the Court to go back into his case again. Second, if it is a hypothetical question, again it does not state all the things that should be in a hypothetical question, and a hypothetical question is out of order at this particular time. It is certainly no way to prove custom, if he is trying to prove custom, and if this were a jury case, our objection would be it would be taking the question from the jury and the Court would under-

(Testimony of James Hutchison.)

stand it. You can't substitute what this man would do with what an ordinary man would do. That is up to the Court to find.

The Court: I feel obliged to sustain the objection on the following grounds: it is improper redirect-examination, the question is indefinite, and it calls for the opinion of the witness on the ultimate fact to be determined by the Court.

Mr. Johnson: That is all.

Recross Examination

Q. (By Mr. Cole): Jim, you are a good driver, aren't you? A. I think so.

Mr. Cole: That is all.

The Court: Before you leave, just a moment, please. for [161] my own clarification and thinking, there has been testimony here about first gear, second gear, third gear, and fourth gear, and low gear and high gear.

The Witness: Yes.

The Court: I would like to know whether the low gear is the same as first and second.

The Witness: Actually, it is not. Low gear on that model car is a lower gear than the second speed gear. It is a lower gear ratio, is what it is, the first speed, but the way this transmission is designed and built, it will not stay into that speed.

The Court: It goes into the so-called second gear without any additional shifting?

The Witness: That is right. It is a semi-

(Testimony of James Hutchison.)

automatic transmission. It is shifted by hydraulic pressure.

The Court: How many different shifts, hand shifts or positions of the hand lever are there?

The Witness: Including reverse, there are three. There is your first speed and your high gear and you lift it up for reverse.

The Court: What does the low gear you speak of include?

The Witness: Well, it is quite a detailed explanation there. That is mainly, it is a main shaft, what they call the first gear in the transmission, and the lower cluster gear. It is a part of the main power train. I would have to have a [162] manual in order to fully describe it to you, how it operates.

Mr. Cole: I think I have maybe a question or two which would be helpful.

The Court: Could you clarify that?

Mr. Cole: Yes.

Q. (By Mr. Cole): Perhaps we had better use the blackboard, because I realize it is confusing. (Drawing diagram on blackboard.) Now, use this as the gear shift lever positions for power, the low speed gear ratio, the power, and this will be the drive.

When the gear shift lever is in power, you have two systems of gears which will operate when the gear shift lever is placed in the power position, do you not? A. That is right.

Q. This one system of gears is called first gear,

(Testimony of James Hutchison.)

and the other system of gears is called second gear; is that correct?

A. Yes, that would be right.

Q. And when the power is in one, the power flows through the so-called main drive?

A. That is right.

Q. And then it goes down from there into a lower system of gears called countermesh gears?

A. The counter gear cluster. [163]

Q. And then it goes over here to another gear and then it goes up to a gear here, and there is a system called another clutch?

A. Synchro-mesh unit.

Q. And the power goes from there back to the rear wheels? A. That is right.

Q. That is your full gear system; is that correct? A. Yes.

Q. When the power is being applied in this first system of gears you have no compression?

A. That is right.

Q. Because as you used the gear right here it doesn't have compression going back through there?

A. No, that is a free-wheeling gear. The lower cluster has ball bearings in it which allows it to slip.

Q. Then, as the car is accelerated and the foot taken off the accelerator, the car automatically shifts into second gear in the power range; is that correct? A. That is right.

Q. And that system of gears is roughly this gear, which is here is out here forward, and then it

(Testimony of James Hutchison.)

comes back through here, and the set of gears, and back to the power, the wheels, the differential?

A. Yes.

Q. There is compression through this system of gears [164] because your counter-mesh gear is not in the power system?

A. That is right, it is locked.

Q. Now, then, there is another system, if the car is shifted and put into the driving range, there are also two forward speeds, are there not?

A. That is right.

Q. And the ordinary way that the average driver shifts the gear shift lever, from the power range to the driving range, is through the operation of the clutch? A. That is right.

Q. The manual clutch. When the car is in the third gear range, the power comes back through this so-called main drive pinion and then it goes down to another gear, which is called the transmission rotating gear, back to another gear in the lower system to a gear in the upper system and back to the rear wheels; is that not correct? A. Yes.

Q. And when the car is being operated in this system of gears there is no compression from the rear wheels on to the engine because you are using the counter-mesh rotating gear in the system; is that not correct? A. That is true.

Q. Now, there is one more forward speed in this type of transmission, and that is when the power comes back through the main drive pinion, and it goes right straight back through a [165] selective

(Testimony of James Hutchison.)

system of gears to the rear wheels and the lower gear system is not used; is that not correct?

A. Yes, free wheeling.

Q. So that there is a braking force on the engine from the rear wheels if power is not applied and the car is coasting down an incline?

A. That is right.

Q. So there is braking in No. 2 system and there is braking in the No. 4 system; isn't that correct?

A. That is right.

Q. Now, the amount of braking which you have through the No. 4 system is perhaps slightly less than it would be in the normal car in high gear; isn't that correct? A. Yes, it is.

Q. And the amount of braking which you have in the second gear system is probably somewhere between the second gear in an ordinary standard transmission and high gear in an ordinary standard transmission? A. Similar thereto, yes.

Q. But it isn't as much as you would have in second gear in an ordinary automobile?

A. No—that is right.

Q. There is one other point which I would like to demonstrate to the Court, if I may.

The Court: You may ask a question subject to objection. [166]

Mr. Cole: Yes, of course.

Q. (By Mr. Cole): When power is generated in the motor from the pistons it is transmitted to the crankshaft; from the crankshaft it is transmitted back through this fluid drive unit; is that right?

(Testimony of James Hutchison.)

A. That is right.

Q. That is where the oil is, in that?

A. Yes.

Q. And there is no mechanical connection between the front part of the fluid drive system and the rear part of the fluid drive system?

A. Right.

Q. The power comes out the back part of the fluid unit, then it goes into this system of gears which we have previously discussed, known as the transmission? A. That is right.

Mr. Cole: Is that helpful?

The Court: Very well. Do you have any questions, Mr. Johnson, on this matter?

Redirect Examination

Q. (By Mr. Johnson): I would like to clear up one matter. During this case we have been discussing gears in the terms of drive and power and using them somewhat synonymously with low and high, as applied, however, to a four-gear transmission, such as this [167] drawing illustrates. Now, whenever I used the word "low" gear, did you understand me to mean the very lowest gear here, or the low power range, I mean?

A. Low gear, I understand, was the low gear like you come to a complete stand-still, you shift the lever up into the low gear. Second speed differs from a low gear.

Q. That is right. This power range is sometimes referred to as low range, and driving range?

(Testimony of James Hutchison.)

A. Yes, it is low range.

Q. As contrasted from the high gear or driving range; is that correct? A. That is right.

Mr. Johnson: That is all.

The Court: Now I wonder if the reporter can find the question I asked the witness.

(Thereupon the reporter read the questions by the Court as heretofore recorded on page 162 of this transcript, and the answers thereto.)

The Court: That was what I was getting at and what didn't come out now.

No further questions of Mr. Hutchison? He is excused.

(Witness excused.)

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Gentlemen, you may proceed.

Mr. Johnson: Thank you, your Honor. [168]

The plaintiff would like to call Lieutenant Botelho.

EMMET MANUEL BOTELHO

called as a witness in behalf of the plaintiff in rebuttal, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Johnson): Will you state your name, please?

A. Emmet Manuel Botelho.

Q. Where do you reside, Lieutenant?

A. Anchorage.

(Testimony of Emmet Manuel Botelho.)

Q. Do you have any official capacity or station with the Territory of Alaska?

A. Yes, sir, I am in charge of all outlying districts, Homer, Kenai, Seward, Palmer, Glenn Allen, and Valdez.

Q. For what department?

A. The Territorial Police.

Q. How long have you been a member of the Territorial Police?

A. It will be fifteen years the 15th of April.

Q. I believe you stated that in the course of your duties you are in charge of what you call outlying areas; is that correct?

A. That is correct.

Q. And that includes Valdez?

A. Valdez, yes, sir. [169]

Q. Does it include the vicinity known as Thompson Pass on the Richardson Highway?

A. Yes, sir.

Q. Were you familiar with or in charge of that area in 1953? A. No, sir, I was not.

Q. Were you familiar with the area that year?

A. No, sir.

Q. In 1953? A. No, sir.

Q. Had you ever been over Thompson Pass at any time during 1953? A. No, sir.

Q. Have you ever been over it since that time?

A. Yes, sir. I took charge two years ago and during that time I make an average of one to two trips every month winter and summer.

Q. What was the condition of the highway from

(Testimony of Emmet Manuel Botelho.)

the summit of Thompson Pass south to Valdez with respect to surfacing?

A. It is all blacktop there.

Q. And was it blacktop at the time you took it over? A. Yes, sir.

Q. Did you have occasion to get a map of this area from the United States Geological Survey at my request? A. Yes, sir. [170]

Clerk of Court: Plaintiff's Identification No. 5.

(The map was marked Plaintiff's Identification No. 5.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 5 and will ask you if that is the map that you referred to.

A. Yes, sir; it is. That is my handwriting there with the signature of the gentleman that gave it to me.

Q. And does that map, in addition to having the printed markings on it which come with the map originally, exhibit some pen and ink marks or lines drawn on it? A. Yes, sir; it has.

Q. And some figures?

A. And some figures.

Q. Who placed those pen and ink marks and figures on there? A. Mr. Isto.

Q. And with whom is he connected?

A. The Geological Survey, sir.

Q. And he produced this map and placed these markings on there at your request?

A. Yes, sir.

Q. Did he do it in your presence?

(Testimony of Emmet Manuel Botelho.)

A. Yes, sir.

Q. What data did he use for putting on those marks?

A. I requested, I told him exactly what I wanted and [171] asked him——

Mr. Clasby: Just a moment. We object to the answer and ask it be stricken. It is not an answer to the question that was asked.

Q. (By Mr. Johnson): What did he use for information in putting on those markings and figures, if you know?

Mr. Clasby: I object to that as being hearsay; as far as we are concerned, we don't want to get information in here secondhand.

The Court: That is what we are heading for, there is no doubt. I can see that the identification would be hearsay, or portions would be hearsay, and it will be sustained. I wonder if you wanted to show it to counsel.

Q. (By Mr. Johnson): First of all, what do these markings purport to mean or signify?

A. They are mileage or grade points.

Q. By "grade points," what do you mean?

A. The average of different grades in the miles, the downgrade. What I asked, I can't exactly explain it——

Q. Are you talking about the percentage grade?

A. The percentage grade of descent, that is right, sir.

Q. And those are the markings that appear on that? A. That is correct. [172]

(Testimony of Emmet Manuel Botelho.)

Q. And for the portions of Richardson Highway which descends Thompson Pass on the Valdez side?

A. That is correct, sir.

(Mr. Johnson handed the map to defendant's counsel.)

Mr. Clasby: We would object, if counsel were offering the identification as an exhibit, to its admission in evidence on the basis that it purports to show grades from a source of information that we have no knowledge about or opportunity to cross examine. We don't know how accurate these are or how accurate that could be.

Q. (By Mr. Johnson): I believe you stated that the gentleman who signed his name to this, Mr. Isto, works for the United States Geological Survey?

A. That is correct, sir.

Q. And did he place those figures and percentages on that map from information which they have in his office? A. Yes, sir.

Mr. Johnson: We believe that the proper foundation has been laid and we offer it, your Honor.

The Court: I am obliged to sustain the objection as hearsay and no proper foundation laid.

Q. (By Mr. Johnson): From your experience as a highway patrol officer, have you had occasion to drive down Thompson Pass? [173]

A. Yes, sir.

Q. From the summit toward Valdez?

A. Yes, sir.

Q. What, if anything, did you do with reference

(Testimony of Emmet Manuel Botelho.)

to conducting tests on that side of the pass in different methods of driving, and so on?

Mr. Clasby: Just a moment. I would like to have the question specific enough so that we would have some idea of the train of testimony to see if it is within the issue that is being opened up by counsel. I can't tell whether this is getting clear off the beaten track again or whether we are still confining ourselves to the point of this phase of the hearing.

The Court: I can't tell from your statement what objection you are making, Mr. Clasby.

Mr. Clasby: It is impossible, if the Court please, for us to tell when he asks the witness: have you ever conducted any tests about driving down the Valdez side of Thompson Pass?—if he answers "Yes," then I may have a further objection—just what counsel's point is, whether he is within the scope of his examination or not. I think he should define the type of test he has in mind.

The Court: Yes, I think if you had merely made the concise objection, I would sustain it, and I will sustain it as being incompetent, irrelevant and immaterial at this time as to whether he ever did.

Q. (By Mr. Johnson): Will you describe to the Court the descent of the Richardson Highway from the summit of Thompson Pass on down, and tell the Court as nearly as you can from your own observation and memory what it looks like, what it consists of, in the way of curves, and how steep it is, if you know anything at all about it?

(Testimony of Emmet Manuel Botelho.)

A. Well, from experience, the first time I went over the incline two years ago——

Mr. Clasby: Just a moment. Would you just answer the question, please?

Q. (By Mr. Johnson): Describe it as nearly as you can.

A. I would say it is a steep grade from the crest of the hill at Thompson Pass down, the first two miles is very steep. After the two miles you come to an extreme curve to your right. From there on down it is practically another seven miles of straight highway, which I should judge would be a grade of about seven percent—seven or eight percent, which is considered an extremely steep grade.

Q. Are there any sharp curves from the summit down to this first point at, you say, about two miles below the summit? Are there very many sharp curves or turns in that first two miles?

A. No, it is not—not too severe.

Q. They are more or less gradual? [175]

A. Gradual curves.

Q. Do you have any knowledge of the grade of descent or the rate of descent in the first two miles?

A. Well, I think it would average out at around——

Mr. Clasby: Just a moment. Are we understanding that you are testifying from your memory and your experience and not the information that you have through this document that was excluded from evidence?

The Witness: From my own memory, sir.

(Testimony of Emmet Manuel Botelho.)

Mr. Clasby: All right.

Q. (By Mr. Johnson): Now, what is your memory with respect to the rate of descent from the summit down to that two mile curve?

A. I would say it is about a six percent grade.

Q. On an average all the way?

A. Yes, sir.

Q. From your experience as a highway patrol officer, is a six percent grade steep or gradual, or how would you describe it?

A. It is a very steep grade, sir.

Mr. Johnson: That is all.

Cross Examination

Q. (By Mr. Clasby): As I understand it, you have a curve down the hill about two miles from the summit? [176] A. That is correct, sir.

Q. Would it be fair to state, in describing that curve, that is is a 35-mile-an-hour curve, or a 25-mile-an-hour curve; that is, is it fair to state in terms of speed around which you can go around the curve?

A. For a safe speed, I would say 30 miles an hour, sir.

Q. And at the bottom of this run of seven miles there are some curves, are there not?

A. Yes, there are, sir, but not very extreme curves. Just short, and not too dangerous.

Q. At what speeds can those be safely negotiated?

A. I would say between 25 and 30 miles an hour.

(Testimony of Emmet Manuel Botelho.)

Q. At the top of the summit, approaching from this side, does the degree of ascent level out some distance this side of the summit and become more gradual until the top of the summit is reached and then more gradual on the other side for a distance?

A. Yes, sir.

Q. What is the distance on this side of the summit that you would say the road extended where the grade wasn't significant?

A. I would say the first mile, sir.

Q. And on the other side of the summit, the Valdez side, about what distance would you say, as a driver, that the grade is not significant? [177]

A. Are you referring to past that bad curve on the straightaway?

Q. No. Visualizing you have come to the very top of the summit, how far ahead of you in distance would you say the road was where there was no significant grade, as far as a person driving an automobile is concerned, realizing you immediately start downward. I think you have in mind what I have in mind. How far must you go after you reach the crest before you come into a grade that is appreciable? A. About a mile, sir.

Q. About a mile? A. Correct.

Q. So you have a two-mile area, one mile on each side of the actual crest, where the grade is, let us say, more or less normal for highway driving?

A. Yes, sir; after you pass the first mile there it kind of tapers off gradually.

(Testimony of Emmet Manuel Botelho.)

Q. And then as you go toward Valdez, after the first mile, you do run into a steeper grade?

A. That is correct.

Q. And is that where this curve is?

A. The curve is on the two-mile stretch, sir.

Q. Then, you run into a steeper grade?

A. After you pass that. [178]

Q. And then do you level off a bit again before you go into the place where the curve is?

A. Just a trifle. I would say it is only about two degrees difference between your steep and where it levels off.

Q. And this last bit of descent is about seven miles; is that correct?

A. That is correct, sir.

Q. At an average angle of about seven percent?

A. Seven percent straight through.

Q. Straight through? A. Yes.

Mr. Clasby: Thank you.

Redirect Examination

Q. (By Mr. Johnson): Now, Emmet, I have become a little bit confused on this. When you refer to the summit, counsel has asked you if the summit itself extends on a level plane for quite some distance or if it is just a noticeable hump and then immediately starts down—do you know, is it a table top or something like that?

A. It is fairly table top, when you come to the crest of the summit, then you start down a grade.

Q. How long is that crest?

(Testimony of Emmet Manuel Botelho.)

A. Well, I would say not over two hundred feet.

Q. When you reach that crest, you go 200 feet level and [179] then immediately start down; is that correct? A. It starts tapering off, sir.

Q. But it starts down?

A. It starts down, that is correct.

Q. With reference to this 200 feet, or this crest, where does the six percent grade begin? Right at the end of it?

A. It just starts tapering right off of the end of it and starts going down. It might be a little more than 200, I couldn't say exactly. I am just estimating.

Q. But it isn't a mile?

A. No. I would say two or three hundred feet, at the most. Then is starts to taper down at a steep grade.

Q. In your work as a highway patrolman, have you attempted to descend from the crest down to that first curve with an automobile by free wheeling, so to speak, or having it in no gear at all?

A. I have, sir, yes.

Q. Have you been able to observe from that operation how far you traveled down that curve——

Mr. Clasby: Just a moment. If the Court please, this again is not proper redirect-examination. I object on that basis.

The Court: It certainly is not proper redirect-examination, but I will overrule the objection.

Mr. Clasby: Then, I move that it be an objection on the [180] basis that it is incompetent, irrelevant

(Testimony of Emmet Manuel Botelho.)

and immaterial, the kind of experiment a person might have conducted.

The Court: I will sustain it at this time.

Mr. Johnson: I have no further questions. Thank you very much.

Mr. Clasby: I have no further questions.

(Witness excused.)

Mr. Johnson: That is all.

Mr. Clasby: We at this time think it is appropriate to renew our objections before we ask to go forward. We submit there has been nothing new brought in here than can add anything to the testimony that the plaintiff already had, nothing at all to indicate that the conditions were anything different than the Court had before it at the time of our original motion, and we have a much clearer conception of the gears on the car and how the car worked and also by virtue of that knowledge that the engine force exerted when in second gear is something just slightly less than high gear in the conventional type of automobile. We now have knowledge that in the second gear, with the application of power, speeds of 75 and 80 miles an hour can be achieved. We still have no knowledge of how much higher speeds may be reached with a vehicle going without the application of power, of coasting. It seems practical to presume as lay persons that it probably would exceed that speed which can be produced by the application of power, and we have a hill down beyond where apparently the car crashed, seven miles long, [181] with a seven-percent grade,

and the need to negotiate the bottom of that hill, a curve, at speeds not to exceed 25 miles an hour, and I don't discover in any of the additional testimony anything at all that appears to me helpful to the plaintiff or that in any way changes the circumstances and evidence that existed at the conclusion of the plaintiff's case. If anything has been accomplished by the evidence, it has been to buttress the position and argument taken by the defendant.

Mr. Johnson: If the Court please, I should like to make a request before the Court rules on this particular motion. You will recall that at the beginning of the case we had interposed a motion to amend the complaint. That motion was taken under advisement and has never been ruled upon. If it is permissible, we would like to have a ruling on that motion so that it is in the record before the Court rules on the motion just now made.

The Court: And, Mr. Johnson, what motion do you refer to that the Court reserved ruling on?

Mr. Johnson: I am referring, at the beginning of the case before we began taking testimony, I asked leave to amend the complaint by interlineation in paragraphs 7 and 8, raising the amount requested from $15,000 to $50,000, in accordance with the 1955 Statute, and if I recall correctly, the Court did not rule on the motion at that time. I could be mistaken about it.

The Court: That is correct, and I now know what motion you refer to, and my statement was, or I intended it to be, [182] that I would reserve ruling on that motion, depending upon what I did on

the question of liability. The motion would be moot if I determined that the liability was not established. There would be no reason for ruling on the motion. But I want to give you an opportunity, if you wish, to resist the motion just made by the defendant. Do you resist the motion?

Mr. Johnson: Of course, we resist. We resist it entirely on the basis that we believe the evidence clearly establishes the negligence of the driver of the automobile in descending this unknown hill, if you wish to call it that, without brakes, knowingly without brakes, but knowing also in descending any type of hill that the best method of procedure, even with this complicated mechanism and gears, that the best method of procedure is to put it in the power range, because the moment it transfers from first to second there is a braking action on the part of the engine and the witness Mr. Hutchison testified that a car of this condition could have been driven safely to the bottom of the hill, and obviously Mrs. McDonald knew that when she said, after they had started down, not to jump out or not to get worried because as soon as she got the car in gear everything would be all right. Even she knew it, and certainly it indicates very clearly to me, at least, that that is an act of negligence and is an omission to do something that an ordinarily prudent person would have done under similar circumstances, and we believe that on that basis that the plaintiff has established [183] a case of negligence on the part of the driver of the automobile and that the plaintiff's intestate was not responsible in any

way, did not contribute to that particular act, because it started from the moment they had their prayer meeting and continued on until they ran off the road. She was in full charge of the car and certainly made the decision to go forward, knowing the condition of the terrain and the surrounding area and the wilderness that existed, and knowing also that there was no other place to go except to get out, particularly when one of the occupants of the car, at least, was so frightened as to want to jump out and save herself, and so far as I know there is no denial of that testimony. It is corroborated by the boy, who says that his mother had ample opportunity to do the things that an ordinarily prudent person, I believe, would have done and should have done. Even if she had left it in high gear after starting down, she would have had some method of braking action, because as Mr. Hutchison says, that the minute you put it into high range it goes into third momentarily and automatically advances into fourth gear, and that is the gear that has the brakes or compression action. She knew something was wrong and she knew she had done something wrong when she got the thing out of gear and it was rolling along in neutral. Then suddenly somebody wanted to jump out of the car, which I assume is a natural reaction, but she was told, "Oh, no, don't bother to jump out. You are going to be all right. I am going [184] to get this in gear in a minute and everything will be fine," and then they say that is not negligence. We believe it is, your Honor.

(Thereupon a ten-minute recess was taken.)

The Court: To make the record clear, I understand that the motion now before the Court is the defendant's motion to dismiss; is that correct?

Mr. Clasby: That is correct, made at the conclusion of the plaintiff's case—made at the conclusion of the case with respect to all except possibly rebuttal to this additional testimony that went in pursuant to permission to reopen the direct-examination.

The Court: There would be no object in your rebuttal testimony if I should grant the motion.

Mr. Clasby: There would not. The Court has before it the facts.

The Court: Now we come to the stage of the proceeding that is indeed trying and difficult for me, but I feel that I must grant the defendant's motion to dismiss.

I found during the trial, as you all know and as I have announced on more than one occasion, that the plaintiff's intestate was guilty of contributory negligence or at least assumed the risk of riding in defendant's vehicle, knowing that the foot brakes were worthless, and I heard further testimony on the theory that the contributory negligence of the plaintiff's intestate, or if you prefer to call it the assumption of risk, became static [185] when the persons proceeded on and perhaps the plaintiff could predicate his claim on subsequent negligence of the driver of the car with full knowledge on the part of the driver and the plaintiff's intestate that the brakes were worthless and had no effect. So it was

on that additional theory that we proceeded with the trial and heard testimony.

The plaintiff rested, the defendant rested, and I indicated that I could see nothing in the evidence that would permit recovery. I couldn't see that the driver of the car had violated any duty that she might have owed to the plaintiff's intestate. So permission was given to reopen, and I was carefully trying to examine the evidence to see whether or not the driver of the car used reasonable care for her own safety and for the safety of others in starting down that long hill without putting the gearshift into the low gear. So then we had additional testimony, and one man, who is an expert, and I think I was very liberal in permitting the plaintiff's witness to testify, said that the car even in the low gear on the incline in question would gain a speed of from 70 to 75 miles per hour, and then the testimony of the plaintiff's witness brought in after I permitted plaintiff to reopen gave this answer, and I quote, and this is on direct-examination:

"I believe that an ordinary driver could descend that Pass safely under control if he was on the ball and knew [186] what he was doing. He could follow the procedure of dropping the gear, applying emergency brakes sparingly, and following the shoulder of the road, the soft shoulder, and staying in that as much as possible."

Now, I don't believe that ordinary care that is required of a person under the circumstances, as the defendant's wife was, required doing that which the expert witness said might have been done, be-

cause those aren't in my opinion driving measures that would be expected of an ordinary person, and I find nothing in the evidence to prove the negligence of the driver of defendant's motor vehicle such as would enable a recovery in this case, and I therefore grant the defendant's motion for dismissal.

Now, in the hope that it might be raised on appeal, perhaps I am wrong in saying that the question is moot, because plaintiff's counsel has urged on me again to rule on the motion to amend the complaint to increase the amount. So as to clarify the record in that respect and to give the plaintiff any possible benefit of the ruling, I will deny the motion to increase the amount, hoping that that might be reviewed on appeal.

Mr. Clasby: Would the Court care to have us prepare a written Order?

The Court: If you wish, you may submit one.

Mr. Clasby: Would the Order embrace costs?

The Court: I will consider that.

Is there anything further at this time? If not, Court will adjourn.

(Thereupon at 4:10 p.m., October 11, 1956, the trial of this case adjourned sine die.) [188]

[Endorsed]: Filed Oct. 29, 1956.

[Endorsed]: No. 15381. United States Court of Appeals for the Ninth Circuit. Earl G. Aronson, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of said Estate and Earl G. Aronson, surviving husband and Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., surviving children of said decedent, Appellants, vs. George A. McDonald, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed: December 10, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15381

EARL G. ARONSON, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of the said Estate of Flora Ritta Mae Aronson and Earl G. Aronson, surviving husband, and Earlene A. Roberts, Betty C. Howard, and Earl G. Aronson, Jr., surviving children of said decedent, Plaintiff, Appellant,

vs.

GEORGE A. McDONALD,
Defendant, Appellee.

DESIGNATION OF RECORD

The Appellant, above named, by Maurice T. Johnson, his attorney, hereby adopts the original Statement of Points and original Designation of Record appearing in the typewritten transcript of the record now on file in the above entitled court, and requests that this Designation of Record be also included in the abstract, pursuant to Rule 17(6).

Dated at Fairbanks, Alaska, this 13th day of December, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 15, 1956. Paul P. O'Brien, Clerk.

No. 15,381

IN THE

United States Court of Appeals

For the Ninth Circuit

EARL G. ARONSON, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of said Estate and Earl G. Aronson, surviving husband and Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., surviving children of said decedent,

Appellant,

vs.

GEORGE A. McDONALD,

Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 15,381

IN THE

United States Court of Appeals

For the Ninth Circuit

EARL G. ARONSON, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of said Estate and Earl G. Aronson, surviving husband and Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., surviving children of said decedent,

Appellant,

vs.

GEORGE A. McDONALD,

Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

Appellant's statement of the case is a fair summary of the pleadings, and of appellant's motion to amend. Excepting for a reference to Identification No. 5 the statement is barren of any summary of the evidence. In that the basic attack of appellant is directed toward

the court's findings, we believe a summary of the facts should have been presented.

Trial proceeded on the issue of liability only (Tr. 33). Two persons survived the crash, Mrs. John Dickerson and George McDonald Jr., who was 15 years of age at the time of the collision (Tr. 78, 117). Mrs. Dickerson testified orally, and Mr. McDonald, Jr., by deposition. The ladies noted in the complaint, and this boy, were acquaintance through church work in Fairbanks, and planned a trip by auto to Anchorage as a vacation undertaking. The vehicle was that of George McDonald, and was driven by his wife. The party shared the expenses of the trip in other respects (Tr. 48, 49; 62-63). The party proceeded to Anchorage, a community some 435 miles south of Fairbanks (Tr. 83); visiting there, and at Seward, a community about 128 miles south of Anchorage (Tr. 45). On the day prior to the accident the party left Anchorage about noon, then headed for Fairbanks after a brief visit in Palmer, a community about 50 miles north of Anchorage and on the highway (Tr. 46-48). The historic major highway in Alaska is the Richardson, a road connecting Fairbanks with Valdez, a seaport south of Fairbanks. The road from Anchorage, called the "Glenn Highway", leads northeast following a valley north of the coastal range of mountains, and intersects the Richardson Highway at a point known as "Glenallen". This point is 189 miles from Anchorage. From there the Richardson leads south to Valdez, 115 miles distant; and north to Fairbanks, 249 miles distant. The Richardson Highway is marked by

"Mile-posts", numbered progressively north from Valdez, point "0".

After leaving Anchorage the party expressed an interest in a side trip to see Valdez (Tr. 47, 48, 61). In that most of them favored such a side trip, when the Glenallen junction was reached the driver turned toward Valdez (Tr. 48). At that point the party was 115 miles from Valdez, and no objection was made to the side trip (Tr. 48, 58, 61, 83, 86, 87, 128). The party passed the Copper Center settlement (101 miles north of Valdez) and the Tonsina Lodge (79 miles north of Valdez) and encountered a section of highway under construction (Tr. 49). Along this section of highway at a point north of 57 mile (at 62 mile by Mrs. Dickerson, Tr. 50; and 58 mile by McDonald, Tr. 99) the driver crossed a ridge of dirt in the road to let traffic pass. In so doing evidently a rock was struck in a manner breaking a hydraulic brake line, allowing all of the fluid to escape, and leaving the vehicle without foot brakes. The party then decided to go forward toward Valdez to seek repairs (Tr. 50, 59, 67, 68, 89-92, 131, 133, 172).

There was no objection made to proceeding without brakes (Tr. 50, 59, 61, 92, 94, 95, 135) although the danger in so doing was fully appreciated by the passengers (Tr. 61, 62, 69, 171).

Mrs. McDonald proceeded forward with due care using the handbrake to control excess speed (Tr. 63, 67). This damage occurred about 8:30 in the evening (Tr. 52), or perhaps nearer 12 midnight (Tr. 97).

A stop was made at mile 57 (Tr. 57, 62), but the garage there could not make the repairs. But the party decided to go forward, rather than stay at this point, even though they were unfamiliar with the road (Tr. 49, 99, 105), and had no maps or guide book covering the area (Tr. 60, 129).

The country in this area is rolling hills, and the roadway climbs from about 47 mile into the costal range of mountains, crossing at a point known as Thompson's Pass, at 26 mile (Tr. 187, 189-90, 195, 196, 199); and as the party went forward night gathered dark and soon heavy fog settled over the road. The thick fog caused Mrs. Dickerson to ask that they stop, and this being done, a prayer meeting was held (Tr. 53, 64-65, 105).

Soon the driver thought she could see ahead, and said they may as well go forward (Tr. 66, 108, 170), which was done without objection. Within a short distance the roadway began to descend, and it was on this descent that the fatal accident occurred (Tr. 55, 113). As the car gathered speed the driver sought to control it with the handbrake. Soon this brake began to smell, and the car to gain momentum. The driver then pulled the handbrake clear on, and discovered that it had burned out and was completely ineffective. She then attempted to gear down. The type of transmission was semi-automatic, having reverse, neutral, drive and low ranges, each activated by the clutch (Tr. 124, 209, 212, 271-77). When the driver attempted to gear down she put the transmission in neutral, but failed to attempts to force it into low range, or reverse

(Tr. 69, 70, 71, 72). The car then free wheeled down the incline, having achieved by then a speed of 65-70 miles per hour (Tr. 111). The driver then turned off the ignition, and tried her best to ride out the speed of descent. Some 3 to 3½ miles from the top of the Pass the vehicle left the road (Tr. 55-113) and only Mrs. Dickerson and George McDonald Jr. survived the crash.

The hill is a steep grade, from 6 to 10% without relief, having several curves (Tr. 56, 57, 65, 110, 141, 176, 199, 200, 233). About two miles from the summit is the first curve, around which a safe speed would be 30 miles per hour (Tr. 292). This curve was taken by the driver. Then the road drops *7 miles* more at a grade over 7% (Tr. 293, 294) *at the bottom of which is a curve around which a safe speed would be 25-30 miles per hour* (Tr. 292). The car left the road about 5½ miles before reaching this bad curve at the bottom of the hill.

II.

ARGUMENT.

As an aid in following the briefs, appellee's argument will be broken into sections following the alphabetical Statement of Points by appellant.

POINT (a) THE TRIAL COURT ERRED IN DISALLOWING APPELLANT'S MOTION TO AMEND COMPLAINT TO INCREASE THE AMOUNT OF DAMAGES.

Argument.

This amendment was offered at the time of trial (Tr. 29) and objected to by appellee as not timely, among other points (Tr. 31). The court reserved ruling, saying (Tr. 33):

> "It is true that this same question has been previously before the Court, and at that time I looked into it carefully and made what I considered to be a proper ruling. I do not wish to foreclose any additional arguments on the part of counsel and will certainly permit other cases to be shown. I know that the Ninth Circuit Case, United States v. Standard Oil was before me at the time I formerly ruled. Whether I was right or wrong in that ruling, I don't know. I have two or three things in mind at this time: first, whether the motion is timely; if it is, whether it is meritorious; and the third proposition that I have in mind may be moot, depending on what develops. I can see no harm to be done to any of the parties if I should reserve the ruling at this time, and I was about to suggest that we might try out the question of liability in the case before us for trial and, if liability is established, then of course the ruling would be very germane.
>
> Do counsel have any objection to trying out the question of liability, restricting all evidence to the question of liability first and, if liability is established, then we can go into damages."

Trial proceeded, limited to the question of liability. This issue having been terminated against plaintiff,

the proceeding ended (Tr. 300-302). *After* ruling on the merits, the court said (Tr. 302):

> "Now, in the hope that it might be raised on appeal, perhaps I am wrong in saying that the question is moot, because plaintiff's counsel has urged on me again to rule on the motion to amend the complaint to increase the amount. So as to clarify the record in that respect and to give the plaintiff any possible benefit of the ruling, I will deny the motion to increase the amount, hoping that that might be reviewed on appeal."

There appears to be no question but that this issue was moot before the trial court; and that it is also moot here. Nothing can be claimed as error on appeal justifying a reversal which would not affect the result reached by the lower court. Accordingly the ruling of the lower court on this point cannot be made the basis for a reversal.

Should this court reverse the lower court's decision on other points, then this court may, if it chooses, comment on this point. An expression of the court's views would be helpful to the trial court and counsel. We comment on counsel's argument with only this view in mind. The 1955 Alaska Wrongful Death Act, ch. 153, S.L.A. 1955, is not applicable to this case because of the provisions of Section 19-1-1, ACLA 1949. This section, a common type of savings statute, reads as follows:

> "The . . . amendment of any statute shall not affect . . . any act done or right accruing or accrued or any action or any proceeding had or commenced prior to . . . such amendment; . . ."

And that is this case. The accident occurred July 30, 1953. This action was commenced October 7, 1953. The Act was amended effective June 28, 1955, [Approved March 28, 1955, and effective 90 days thereafter; § 14, Organic Act 4-3-3, ACLA 1949].

The amendment came after this action was commenced. The foregoing statute is clear in its language; and applied to the facts of this case, it does, without question, bar consideration of the amendment as applicable to this action.

Following the semi-colon which ends the above quotation from Section 19-1-1, the statute deals with the release or extinguishment of a penalty, forfeiture or liability. This case involves neither the release nor the extinguishment of a penalty, forfeiture or liability and therefore this part of the savings statute is not pertinent.

Appellant relies on *United States v. Standard Oil Company of California* (S.D. Cal. N.D. 1937), 21 F. Supp. 645; aff'd (9th cir. 1940), 107 F. 2d 402. This case says that since at common law interest, as an element of damage in a conversion action, was discretionary with the court, therefore a statute fixing interest from this date of conversion conferred no vested right that could not be subsequently abrogated by a statute retroactive by its terms.

At common law the right of action for injury abated upon the death of the person injured. Accordingly the right created by the statutes is to damages, and the indemnity is limited to the statutory limitation. The

situation presents no comparison with that in the *Standard Oil* case (supra).

The situation in this case is not new. Often legislatures have raised the limits of the recovery under wrongful death acts; and the courts have consistently refused to apply the new sum as the measure in either pending cases, or causes arising prior to the amendment.

Field v. Witt Tire Co. of Atlanta, Ga. (2d Cir. 1952), 200 Fed. 74;

Theodosis v. Keeshin Motor Express Company, Inc. (Ill. 1950), 92 N.E. 2d 794;

Keeley v. Great Northern Ry. Co. (Wisc. 1909), 121 N.W. 167 at 170.

See also Annotation: 77 A.L.R. 1338.

POINT (b) THE TRIAL COURT ERRED IN REFUSING ADMISSION IN EVIDENCE OF APPELLANT'S IDENTIFICATION NO. 5.

Argument.

Appellant failed to point out in his brief wherein this error, if it be error, affected substantial rights of appellant. Rule 61, F.R.C.P. This same witness in his testimony (Tr. 291, 292, 293, 294, 295) gave his personal estimate of the grades and distances involved. He testified thereto as independent oral evidence, not related to the exhibit. His testimony was not correlated to the exhibit, or attempted to be, as a foundation therefor, and the identification was not thereafter offered. Other witnesses for appellant and witnesses for appellee also described the road grade and dis-

tances. There was very general agreement among all these witnesses as to the facts, and it is not asserted that Mr. Isto's figures, if admitted, would impeach any witness, show any different condition, or lead the trial court to any different ruling on liability.

Accordingly appellant has not shown wherein this error, if one it be, is a basis for reversal of the trial court's ruling.

This identification is a topographical map of the area around Thompson Pass, prepared and printed by the United States Government. There had been written in ink on it lines and figures purporting to show the various degrees of grade of the highway leading down from Thompson Pass toward Valdez. Appellant's witness, Emmet Botelho, testified that the lines and figures had been written on the map by a Mr. Isto, an employee of the United States Geological Survey, the figures having been obtained by Mr. Isto from a map in the Survey office. The introduction of the map was objected to by appellee as hearsay and was excluded by the trial court (Tr. 287-289).

> "Hearsay evidence is testimony in court or written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." McCormick on Evidence, 1954, § 225, p. 460. See also 5 Wigmore on Evidence, 3rd E. § 1362.

When this definition of hearsay evidence is applied to appellant's Identification No. 5, it becomes apparent

that the Identification is hearsay, if not double hearsay. The map was sought to be introduced for the purpose of introducing into evidence the written statements made on it out of court by Mr. Isto; the written statements of Mr. Isto were an assertion of the highway grades leading from the top of Thompson Pass toward Valdez, and were offered to prove the truth of the assertion. The probative value of the written lines and figures thus rests on the credibility of Mr. Isto, who was not present in court to testify and be subjected to cross-examination.

In his brief appellant argues that the identification was admissible because it was only necessary for Mr. Botelho to testify that the map correctly represented the scene; not that he prepared it. While it is true that maps, photographs, etc. need not be prepared or taken by the witness through whom they are sought to be introduced, the theory being that once the witness testifies that they accurately portray the scene, the exhibit is the non-verbal testimony of the witness. Appellant's Identification No. 5 does not come within this rule of law. The identification was not introduced as the non-verbal testimony of Mr. Botelho, but as the testimony of Mr. Isto.

POINT (c) THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE APPELLEE AND PARTICULARLY ERRED IN ADOPTING FINDINGS OF FACT NUMBERS VI, VII, AND VIII.

POINT (d) THE TRIAL COURT ERRED IN ADOPTING CONCLUSION OF LAW NUMBERS I, II [AND III, PROPERLY CONSIDERED UNDER POINT (e)].

Argument.

Appellant's presentation of his arguments relating to these claimed errors is largely factual, and appears more logically treated under one heading.

The offending Findings and Conclusions are as follows:

Findings

VI.

"The operator of the vehicle then proceeded to drive toward Valdez, Alaska, without brakes, in the night-time, and on a road unfamiliar to her or to any passenger after consultation with her guests, without objection by her guests and with the consent of her guests, including plaintiff's decedent. That the party stopped at a roadhouse at 57 mile seeking repairs; and again proceeded onward without objection by and with the consent of decedent's intestate. That the party encountered heavy fog and stopped by the road at a point on or near the summit of Thompson's Pass. That again the party proceeded forward without objection by and with the consent of decedent's intestate."

VII.

"That the operator of the vehicle encountered a long descent unknown to her and upon which she

was unable to control the vehicle with the hand brake. That the hand brake burned out and the vehicle accelerated by gravity on the descent to a speed causing the vehicle to leave the roadway and overturn. That the proximate cause of the accident and the fatal injuries to plaintiff's intestate was the operation of said vehicle without brakes."

VIII.

"That said vehicle was in all other respects being operated by defendant's wife with the exercise of ordinary care; and that defendant's wife was in no other respect negligent."

Conclusions

I.

"That defendant's wife, Naomi McDonald, was negligent in operating a vehicle without brakes; and that said negligence was one of the proximate causes of the fatal injuries to plaintiff's decedent."

II.

"That plaintiff's decedent was contributorily negligent in continuing to ride in said vehicle so operated without remonstrance or objection, and became a co-adventurer in, or assumed the risk of proceeding in the face of the danger and conditions and circumstance, which negligence on her part contributed as one of the proximate causes of her fatal injuries, the same being a peril within the area of the risk assumed."

Exceptions to the Findings and Conclusions must be judged in the light of Rule 52(a), F.R.C.P., reading in part:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses. . . ."

It is well settled that the test is that a court will not hold a finding clearly erroneous unless the reviewing court from the entire evidence is left with a definite and firm conviction that a mistake has been committed.

United States v. Oregon State Medical Society (1952), 343 U.S. 326, 339; 72 S. Ct. 690, 698; 96 L. Ed., 978;

United States v. United States Gypsum Co. (1948), 333 U.S. 364, 395; 68 S. Ct. 525; 92 L. Ed. 746.

See also:

Kimberly Corporation v. Hartley Pen Company (9th Cir. 1956), 237 F. 2d 294, 300;

Nishikawa v. Dulles (9th Cir. 1956), 235 F. 2d 135;

Furukawa v. Ogawa (9th Cir. 1956), 236 F. 2d 272.

We assert that each Finding and Conclusion is well founded on evidence in the record, as appears from our Statement of the Case, supra. And with this assertion appellant takes no real factual issue [See appellant's brief, p. 18 under (d)].

The *factual* issue asserted by appellant's argument is that Mrs. McDonald should have geared down the car, and if she had done so, a safe descent of the hill

might have been made. Such "second guessing" or conjecture, is abhorent to the courts, the inquiry being directed only to that which a reasonable person would have done under like circumstances. The court allowed appellant to reopen his case to exhaust every facet of conduct open to the driver (Tr. 224-227).

> "The Court: Gentlemen, I wish the matter were as clear to me as it is to each one of you counsel. In my mind we have some very, very serious legal questions and factual questions upon which those legal questions may depend. I think, at least, I agree with defense counsel that if the accident were proximately caused by the defective foot brakes, then the plaintiff cannot maintain this action, because it is clear that she acquiesced in riding in the car, knowing of its dangerous condition—knowing it did not have foot brakes.
>
> "The fact that counsel has not commented on the features that are worrying me the most, or if you have commented, I didn't grasp your arguments, I want you to know that the things that is bothering me the most—suppose I should find, and I can, from the evidence—there was some discussion among the attorneys where this car was stopped when they had the so-called prayer meeting—but suppose I should find, as testified by the young man, that from where they had the prayer meeting after the fog lifted she could see—Mrs. Dickerson said she couldn't see even when they started up, but George McDonald said he could see and he saw there was a drop from there on, that is, right where they had the prayer meeting and the discussion as to whether they should go on or not, it was steep down ahead of them, trying to decide whether to go on without foot brakes. Now, sup-

pose [102] I should find all of that, the part that troubles me greatly is this: the plaintiff has the burden of proof in this, there is no doubt of that, but wherein in the evidence, and maybe you can point it out to me, do I find any credible evidence that it was, in fact, negligent for the driver of the car not to shift the level into low gear. Let us assume that that would be negligence, or let us not assume it. We can't assume it. Do I take judicial notice of the fact that had it been shifted into third gear that it would have gone down this particular mountain without mishap? Am I to take judicial notice of that fact? Am I a mechanic experienced enough, or supposed to be, to know the effect of that? I don't know how many miles it had on it, how much compression it had, I don't know how much it would have held it back had it been in second or third gear. I don't know a thing about it.

"I suppose plaintiff is going to say, 'We have the deposition of the boy and he gives an opinion' which he may or may not have been qualified to give, but he said in answer to this question I read from page 128:

> 'Q. Mr. Pipkin asked you based on your experience how in driving and your remembrance and recollection of what happened on that occasion, had she started down this hill in first gear and the hand brake set she probably could have made it?'
>
> 'A. She would have made it I am pretty sure because I have driven several cars with the same transmission setup and everything.'

"And then he goes on to tell some of his experiences in stopping the car, but is that the type of

evidence that I am to say is sufficient to sustain the burden of proof. That is the part that is bothering me.

"In other words, where in the evidence do I find this man, this boy who testified, doesn't show any familiarity with the particular highway in question, what would have been the result had the driver of the car put the transmission into a lower gear? I don't know. Am I to speculate against the defendant and find that the accident would not have happened or must I base such a finding on testimony, where is the testimony that this accident would not have happened had the driver of the car done something that the plaintiff claims she could have done and didn't do? Where is the evidence on that point?

"That is where I am bothered. As I say, am I to take judicial notice of what would have happened to that particular car had it been shifted into a lower gear?

"Mr. Johnson, I suppose that I am addressing that query to you, because that really has me bothered."

As a consequence, the matter was reopened, and the evidentiary point became a study of whether or not the driver *could have* controlled the car and safely managed the descent. Appellant's witness, James Hutchison, an expert and experienced driver of the type of car involved over the road involved, did testify as noted in appellant's brief, pp. 15 and 16; however, in response to the last question noted in the brief, his ultimate answer was:

"Q. (By Mr. Johnson) Could an ordinary driver do it?

A. I believe an ordinary driver could . . ." Tr. 269).

(Objection and ruling.)

"A. I believe that an ordinary driver could descend the Pass safely under control if he was on the ball and knew what he was doing. He could follow the procedure of dropping the gear, applying emergency brakes sparingly, and follow the shoulder of the road, *the soft shoulder and staying in that as much as possible.*" (Emphasis supplied.)

The court commented on this witness' opinions (Tr. 271), saying

". . . It seems obvious to me, and I decline to comment, and I wouldn't if it were a jury case, but it seems obvious to me that the witness has injected a lot of things that might have been done by the driver that are not within the testimony of the case . . ."

The court's summation of the case (Tr. 300-302) again disposes of this contention by appellant.

"Now we come to the stage of the proceeding that is indeed trying and difficult for me, but I feel that I must grant the defendant's motion to dismiss.

"I found during the trial, as you all know and as I have announced on more than one occasion, that the plaintiff's intestate was guilty of contributory negligence or at least assumed the risk of riding in defendant's vehicle, knowing that the foot brakes were worthless, and I heard further testi-

mony on the theory that the contributory negligence of the plaintiff's intestate, or if you prefer to call it the assumption of risk, became static [185] when the persons proceeded on and perhaps the plaintiff could predicate his claim on subsequent negligence of the driver of the car with full knowledge on the part of the driver and the plaintiff's intestate that the brakes were worthless and had no effect. So it was on that additional theory that we proceeded with the trial and heard testimony.

"The plaintiff rested, the defendant rested, and I indicated that I could see nothing in the evidence that would permit recovery. I couldn't see that the driver of the car had violated any duty that she might have owed to the plaintiff's intestate. So permission was given to reopen, and I was carefully trying to examine the evidence to see whether or not the driver of the car used reasonable care for her own safety and for the safety of others in starting down that long hill without putting the gearshift into the low gear. So then we had additional testimony, and one man, who is an expert, and I think I was very liberal in permitting the plaintiff's witness to testify, said that the car even in the low gear on the incline in question would gain a speed of from 70 to 75 miles per hour, and then the testimony of the plaintiff's witness brought in after I permitted plaintiff to reopen gave this answer, and I quote, and this is on direct-examination:

'I believe that an ordinary driver could descend that Pass safely under control if he was on the ball and knew [186] what he was doing. He could follow the procedure of dropping the gear, apply-

> ing emergency brakes sparingly, and following the shoulder of the road, the soft shoulder, and staying in that as much as possible.'
>
> "Now, I don't believe that ordinary care that is required of a person under the circumstances, and the defendant's wife was, required doing that which the expert witness said might have been done, because those aren't in my opinion driving measures that would be expected of any ordinary person, and I find nothing in the evidence to prove the negligence of the driver of defendant's motor vehicle such as would enable a recovery in this case, and I therefore grant the defendant's motion for dismissal."

It is clear that the court sought out every evidentiary factor helpful to plaintiff; and a reading of the entire record leaves one far from feeling the Findings erroneous, and, instead convinced that the trial court could not have reached any different result.

Appellant, while conceding assumption of risk in his brief, labors the point that the driver was negligent in not gearing down, to which negligence there was no assumption of risk or contributory negligence.

This argument is moot, granting substance to the Finding that the driver used ordinary care under the circumstance (Tr. 302) and need not be reached for comment by the court. Appellee in this connection reasserts the position taken at the trial, namely, that by failing to object to proceeding without brakes, appellant's decedent was negligent toward all of the risks inherent in operating an automobile without brakes, one of which is that if the brakes are not functioning

the driver of the automobile may not be able to control its speed while driving down hill, with resulting injury to passengers. In terms of assumption of risk, the event which occurred was within the scope of the risks appellant's decedent assumed. Hence plaintiff is barred from any recovery in this action.

The distinction between "assumption of risk" and "contributory negligence" [and as applied to the facts of this case no distinction is necessary] is well set forth in the case of *Landrum v. Roddy* (Neb. 1943), 12 N.W. 2d 82, cited by appellant. The contributory negligence in that case was an acquiescence toward hazardous driving conduct. Here the same thing can be said.

The following are sound authority for the position taken by the trial court:

1. Generally, on the question of contributory negligence: Prosser, *Torts,* 2d ed., § 51; *Restatement on Torts,* §§ 463-496 (see in particular § 466[a]; *Sharp v. Sproat,* 208 P. 613 (Kans., 1922); *Clise v. Prunty* (W. Va.), 152 S. E. 201.

2. Generally, on assumption of the risk and contributory negligence, see annotation in 138 A.L.R. 838.

3. Generally, on assumption of the risk, see Prosser, *Torts,* § 55, p. 303; *Knipfer v. Shaw,* 246 N.W. 328 (Wisc., 1933); *Landrum v. Roddy* (Neb., 1943), 12 N.W. 2d 82.

We comment on the cases cited by appellant:

The case of *Mesnickow v. Fawcett* (D.C. App. Cal. 1924) 278 Pac. 500 cited by counsel (Br. 17) does not

support his point. That was an action by a guest against the operator of *another vehicle,* in which the court said, in reply to the contention that the plaintiff was contributorily negligent for failure to warn

> ". . . and, beside this, the danger caused by the blinding of the passing lights was so sudden, and in such close proximity to the collision, that they had no apparent opportunity to warn the driver before the collision occurred."

Most of the cases cited by counsel for appellant deal with contributory negligence, not assumption of risk. We agree that with respect to contributory negligence the following statement from *Murphy v. Smith* (Mass. 1940) 29 N.E. 2d 726, cited by appellant on page 18 of the brief, is a fair statement of the rule:

> "In the last analysis, the rule governing a guest riding in an automobile is that he should conduct himself as an ordinary prudent person would, under the circumstances. If he does, he cannot be held negligent as a matter of law. Following the language adopted in the days of the stage coach and horse drawn vehicles, courts often added that he should call attention to apprehended danger; protest against fast driving, leave the automobile if it could be done with safety, or demand that it be stopped, and then get out of it. Such statements are only illustrations of what a reasonably prudent person might do under the circumstances. They do not constitute a legal standard of what a reasonable prudent person must do. The question is not whether the guest should protest against fast driving, call attention to apprehended danger, or demand that the car be stopped so that

> he could get out. The legal question is whether, under the circumstances he acted with the care that a reasonably prudent man would have used under the circumstances."

The case of *Williamson v. Fitzgerald* (D.C. App. Cal. 1931) 2 P. 2d 201, cited by appellant on page 18 of his brief does not substantiate the contention that "assumption of risk went out of the case at that point". The cited case holds that the rule of imputed negligence cannot be used to bar recovery by one member of a joint venture against another member. In the cited case the facts revealed no contributory negligence.

The case of *Crawford v. Rose* (D.C. App. Cal. 1934) 39 P. 2d 217, cited at page 119 of appellant's brief, involved a guest riding in a rumble seat, bundled over his head by a blanket to ward off fog and cold, certainly evidencing no factual parallel with any facet of this case. Similarly the case of *Binford v. Purcell* (Br. 19) is not applicable.

The cases cited by counsel to the point that the guest had ". . . no duty to leave the vehicle. . ." (Br. p. 20) do not support that point.

In *Squyres v. Baldwin* (La. 1938) 185 So. 14 the vehicle, being driven in a snow storm at slow speed, struck a moving train at a grade crossing. The court said:

> "Merely because it was dark and snowing, the law does not require plaintiff and Johnson (driver) to remain at home, any more than it obligated the railroad to cease the operation of its cars; nor did

> it impose upon plaintiff the duty to get out and walk in the elements rather than continue by automobile."

In the *Squyres* case (supra) and as well in the cited cases of *Richard v. Maine Central Railroad Co.,* 168 A. 811; *Van Fleet v. Heyler,* 125 P. 2d 586, and *Meighan v. Baker,* 6 P. 2d 1015 the test posed by the court did did not relate to a duty to leave the vehicle, but that the:

> "question is whether they failed to take reasonable precautions under the conditions . . ." (*Richard v. Maine Central Railroad,* supra).

the same rule fully expressed in the *Murphy v. Smith* case, supra.

In summation: Appellant's decedent assumed all of the hazard inherent in the operation of a vehicle without brakes. The casualty happened within the area of the risk assumed, and as a consequence recovery cannot be allowed. In addition, by testimony of the plaintiff's own witness (Tr. p. 301), it was shown that if Mrs. McDonald had been able to shift into the low gear, or had shifted into the low gear before beginning the grade down the mountain, nevertheless the car could have attained a speed of 70 to 75 miles per hour; and the evidence also showed that there were at least two curves having a safe speed of 25-30 miles per hour (Tr. pp. 293-294). The evidence amply sustains the trial court's position that there was no new act of negligence to which plaintiff was not contributorily negligent, as the failure to do a useless act is not negligence.

POINT (d) THE TRIAL COURT ERRED IN ADOPTING CONCLUSION OF LAW NUMBERED III.

POINT (e) THE TRIAL COURT ERRED IN ENTERING A PERSONAL JUDGMENT AGAINST APPELLANT (emphasis supplied).

Argument.

Appellant's objection to Conclusion of Law III, and judgment against them for costs, is based on a completely fallacious conception of the Conclusion and Judgment. Appellant feels that the judgment for costs is against Earl Aronson individually because he brought the suit. It is not. It is against Earl G. Aronson, Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., *the persons for whose benefit this action was prosecuted.*

The authority for the judgment is 55-11-65 ACLA 1949, as follows:

> "In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute to prosecute or defend therein, costs shall be recovered as in ordinary cases, but such costs shall only be chargeable upon or collected off the estate, fund, or party represented, unless the court or judge thereof shall order the same to be recovered off the plaintiff or defendant personally for mismanagement or bad faith in such action or the defense thereto."

It is noted from the statute that the administrator personally, when he is bringing an action, is not liable for costs but the costs of the action are chargeable against the "estate". If the action is by the trustee of an express trust, then the costs are recoverable not

from the trustee but of the "fund" thus represented. However since the action is brought "by a person expressly authorized by statute to prosecute" then the costs are recoverable from the "party represented".

The Alaska statute providing for wrongful death actions, Ch. 89, S.L. 1949, is as follows:

> ". . . the personal representatives . . . may maintain an action . . . for an injury done . . . and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children . . ."

Of the three situations presented in the statute certainly the second is not applicable here. By counsel's own position the third one is applicable. Certainly this action is prosecuted under the authority of the statute. It is only incidental that the person named in the statute as authorized to sue is the administrator or executor of the estate. In this law suit there is no contention that the administrator is suing for the estate or on behalf of the estate or is exercising any right of the estate. Conversely it is directly plaintiff's position that he is suing under authority of the statute for the sole and exclusive benefit of the persons named in the pleading. Not one cent of the recovery under plaintiff's theory could or would go to the estate, and accordingly the estate should not be charged with any of the costs. All of the recovery sought under the pleadings would be distributed to the persons represented by the administrator; and under the act, those are the persons that costs must be charged against.

Wien Alaska Airlines, Inc. v. Sammuel Simmonds, et al., No. 15,149 of this court, decided Feb. 11, 1957.

III.

CONCLUSION.

There is no merit, in fact or in law, in any point presented by appellant by this appeal. Appellant's motion to amend is not only moot, but not well taken. The refusal to admit Identification No. 5 was not only correct, but even if incorrect, presents no reversible error. The statutes of Alaska require, upon a finding for defendant, a judgment for costs against the beneficiaries of the action. And from the whole record the findings of the court are well supported and sound, and no showing has been, or can be, made indicating any Findings to be in any particular "clearly erroneous". The decision of the district court should be affirmed.

Dated, Fairbanks, Alaska,
April 23, 1957.

Respectfully submitted,
CHARLES J. CLASBY,
COLLINS AND CLASBY,
Attorneys for Appellee.

Service acknowledged by receipt of copy this 23rd day of April, 1957.

MAURICE T. JOHNSON,
Attorney for Appellant.

No. 15387

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JO EISINGER and LORAIN B. EISINGER,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' BRIEF.

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STATUTES

TEXTBOOKS

No. 15387

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JO EISINGER and LORAIN B. EISINGER,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANTS' BRIEF.

Statement of Pleadings and Facts Disclosing Basis for Jurisdiction of Tax Court and Court of Appeals.

(a) Basis of Jurisdiction of the Tax Court of the United States.

Internal Revenue Code Section 272 (1939 Code) provided in part as follows:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed . . . the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed . . . the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency."

[Sec. 6212(a) and Sec. 6213(a) of the 1954 Code are substantially the same as Sec. 272 of the 1939 Code.]

Appellants' petition to the Tax Court of the United States provided in part:

> "2. The notice of deficiency (a copy of which is attached and marked Exhibit 'A') was mailed to the petitioners, care of their attorney, Aaron B. Rosenthal, 416 West Eighth Street, Suite 1009-16, Los Angeles 14, California, on January 29, 1953." [Tr. Rec. p. 5.]

The petition to the Tax Court for redetermination of the deficiency was filed by appellants on April 17, 1953, that is, within ninety (90) days of mailing of the notice of deficiency. [See Docket Entries, Tr. Rec. p. 3.]

Therefore, the Tax Court had jurisdiction to determine the petition for redetermination filed by appellants.

(b) Basis of Jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Internal Revenue Code, Section 7482 (1954 Code) provides in part as follows:

> "(a) *Jurisdiction.*—The United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. . . ." [Sec. 1141(a) 1939 Code substantially unchanged.]

Internal Revenue Code, Section 7483 (1954 Code) provides in part:

> "The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in

> Section 7482 if a petition for such review is filed by . . . the taxpayer within 3 months after the decision is rendered." [Sec. 1142 in part, of the 1939 Code, unchanged.]

The returns for the calendar years 1949 and 1950, the years in question, were filed by appellants with the then Collector of Internal Revenue for the Sixth District of California at Los Angeles, California [See "Petition", Tr. Rec. p. 5 and "Petition for Review", Tr. Rec. p. 53].

The United States Court of Appeals for the Ninth Circuit is the Circuit Court in which is located the Los Angeles, California Office of the then Collector of Internal Revenue (28 U. S. C. A., Sec. 41).

The decision of the Tax Court in *Eisinger et ux. v. Commissioner,* Docket No. 47871 was rendered on June 13, 1956 [See "Decision", Tr. Rec. p. 52]. The Petition for Review was filed by appellants in The United States Court of Appeals for the Ninth Circuit on September 10, 1956, which was within three months of rendition of the Tax Court Decision [See "Docket Entries", Tr. Rec. p. 4].

Therefore, the United States Court of Appeals for the Ninth Circuit has jurisdiction to hear and determine this appeal.

Statement of the Case.

Jo Eisinger and Lorain B. Eisinger appeal, by way of Petition to Review [Tr. Rec. p. 53], a decision of The Tax Court of the United States entered on June 14, 1956, in cause entitled Jo Eisinger and Lorain B. Eisinger, Petitioners, v. Commissioner of Internal Revenue, Respondent, Docket No. 47,871 [Tr. Rec. p. 52]. The

controversy involves the proper determination of petitioners' liability for Federal Income Taxes for the years ending December 31, 1949, and December 31, 1950. The facts giving rise to the case are as follows:

On March 28, 1949, Jo Eisinger and his former wife, Wilhelmina Eisinger, entered into a written property settlement agreement, which was amended on April 28, 1949 [Tr. Rec. pp. 38-39]. The agreement as amended, provided that Jo Eisinger would pay to Wilhelmina Eisinger, a stipulated sum of money per week, and was incorporated into a final decree entered in a divorce action on May 26, 1949 [Tr. Rec. p. 39].

On their 1949 and 1952 Income Tax Returns, petitioners deducted the amounts of $3,850.00 and $6,677.00, respectively, as alimony paid to Wilhelmina Eisinger pursuant to said property settlement agreement [Tr. Rec. p. 54]. The Commissioner of Internal Revenue determined that of such payments, the sums of $1,925.00 and $3,364.50 represented payments for the support of Jo Eisinger's two minor sons for the years 1949 and 1950 respectively [Tr. Rec. pp. 37-38].

Appellants filed a petition for a redetermination of the deficiency determined by the Commissioner. The Tax Court of the United States by its decision entered June 14, 1956, upheld the Commissioner and determined a deficiency against petitioners in the amounts of $2,458.22 and $925.76 for the taxable years 1949 and 1950, respectively [Tr. Rec. p. 52].

The Question Involved.

Were the total periodic payments made by Jo Eisinger to his divorced wife Wilhelmina Eisinger in 1949 and 1950 properly deductible by appellants Jo and Lorain Eisinger on their Income Tax Returns filed for those years as periodic payments which Jo Eisinger was obligated to make pursuant to an agreement incident to a decree of divorce as contemplated by Section 22(k) of the 1939 Internal Revenue Code, and hence proper deductions under Section 23(u) of said Code?

The Tax Court Decision.

The Tax Court disallowed fifty per cent (50%) of the deductions taken by appellants on the ground that construing the agreement as a whole, fifty per cent (50%) of the amount payable to the wife was identifiable as being for the support of the two minor children [Tr. Rec. pp. 44-45].

Specification of Error.

The Tax Court erred in its holding that part of the sums paid by Jo Eisinger to Wilhelmina Eisinger during the years 1949 and 1950 represented payments for child support rather than payments of alimony.

ARGUMENT OF THE CASE.

The Facts.

The parties have stipulated that Jo Eisinger and Wilhelmina Eisinger were husband and wife; that in 1943, Jo Eisinger obtained an uncontested divorce from Wilhelmina Eisinger and married appellant Lorain B. Eisinger; that in 1949, on her own account, Wilhelmina instituted a suit for absolute divorce from Jo Eisinger; that on May 26, 1949, the final decree of divorce was entered; that at said time Jo Eisinger and Wilhelmina Eisinger were the parents of two minor children; that in connection with said suit for divorce, the parties thereto entered into a written property settlement agreement dated March 28, 1949; that said property settlement agreement was subsequently modified by a written agreement dated May 19, 1949; that the original agreement and the modification thereof were incorporated into the above-mentioned decree of divorce dated May 26, 1949; that pursuant to the terms of said written agreement as modified, and said judgment, appellant Jo Eisinger made payments to Wilhelmina Eisinger in the sums of $3,850.00 and $6,677.00 for the calendar years 1949 and 1950 respectively; that appellants filed joint individual income tax returns for the taxable years 1949 and 1950 and on said returns deducted $3,850.00 and $6,677.00 for the years 1949 and 1950 respectively; that in his statutory notice determining deficiencies, respondent disallowed appellants' deductions as alimony in the sums of $1,925.00 and $3,364.50 for the years 1949 and 1950 respectively; that the determination of whether the payments in question were alimony payments or payments for the support and maintenance of the minor children was the only issue

for the Tax Court to resolve; that the original written property settlement agreement and the modification thereof are as set forth in exhibits to the Stipulation as to Facts [Tr. Rec. pp. 35-40].

Introduction to Appellants' Argument.

The terms of the written instrument as incorporated into the decree of divorce do not fix an amount of money or a portion of the payment as a sum payable for the support of minor children.

As stated before, the sole question presented in this case and on this appeal was and is whether appellants deducted as alimony, payments made to Jo Eisinger's former wife which were in reality payments made "for the support of minor children." The Tax Court sustained the Commissioner's position that of the payments of $125.00 per week made pursuant to the agreement, $62.50 per week was identifiable as being for the support of the minor children [Tax Court Memorandum Decision, Tr. Rec. p. 44]. The Tax Court in its opinion, stated:

> "It is the petitioner's position that the separation agreement provides for the payment of a lump sum to his former wife without specifying the amount to be applied for the support of the children. It is argued that although the agreement provides for the reduction of the total amount payable to the wife by fixed amounts under certain contingencies, until such contingencies arise there is no way of determining what part of the lump sum is for the support of the children, and the rationale of the cases of *Dora H. Moitoret*, 7 T. C. 640, and *Henrietta S. Seltzer*, 22 T. C. 203, is applicable here.
>
> "The respondent contends that the agreement must be construed in its entirety, and when so considered

it is clear that one-half the amount to be paid to the wife represents an amount fixed as payments for the support of the minor children.

"It has been repeatedly held that an adequate consideration of the problem presented requires a construction of the agreement as a whole. *Robert W. Budd,* 7 T. C. 413, aff'd per curiam, 177 F. 2d 198; *Warren Leslie, Jr.,* 10 T. C. 807; *Mandel v. Commissioner,* 185 F. 2d 50, affirming a memorandum opinion of this court.

"On this record, we hold that the amount for the support of the children is identifiable, and the cases relied upon by the petitioner are factually distinguishable. It follows that the determination of the respondent on this issue must be sustained." [Tr. Rec. pp. 44-45.]

It is appellants' earnest contention that the Tax Court decision is in error. Proof of such error involves consideration of:

(a) The relevant portions of the applicable sections of the 1939 Internal Revenue Code.

(b) The relevant portions of the Regulations to the 1939 Internal Revenue Code.

(c) The relevant portions of the agreement in question.

(d) The points in appellants' argument.

(a) The Relevant Portions of the Applicable Sections of the 1939 Internal Revenue Code.

Internal Revenue Code, Section 22(k) provides (in part) that where

"a wife . . . is divorced . . . from her husband under a decree of divorce . . . periodic payments . . . received subsequent to such decree

> in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce . . . shall be includible in the gross income of such wife. . . ."

However, Section 22(k) proceeds to state that

> "[t]his subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband."

Section 23 provides

> "[i]n computing net income there shall be allowed as deductions . . . (u) . . . . In the case of a husband described in Section 22(k) amounts includible under Section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year."

Under the Code, only where payments made by the husband to the wife qualify for inclusion in the wife's income under Section 22(k), may the husband deduct such payments under Section 23(u). Therefore, where payments made are "payable for the support of minor children," within the meaning of Section 22(k), they may not be deducted by the husband.

(b) **The Relevant Portions of the Regulations to the 1939 Internal Revenue Code.**

Regulation 111, Section 29.22(k)—1 reads in part:

> "In general, Section 22(k) requires the inclusion in the gross income of the wife of periodic payments . . . received by her after the decree of divorce. . . .
>
> . . . . . .
>
> "(d) . . . Section 22(k), does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under Section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. . . . *If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in Section 22(k).*" (Emphasis added.)

Note, that in the regulations the respondent, Commissioner of Internal Revenue, provides that there *must be specific designation of that portion for the support of minor children in order for the wife to exclude a portion of the payment from her income, and consequently, in order for the husband to include a portion thereof in his income.*

Regulation 111, Section 29.23(u)—1 reads in part:

> "A deduction is allowable under section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the

payee wife or former wife, as the case may be, under section 22(k). As to the amounts required to be included in the income of the wife or former wife as the case may be, see section 29.22(k)—1."

(c) The Relevant Portions of the Agreement.

Following are the provisions of the agreement between Jo and Wilhelmina Eisinger which are relevant to the court's determination of this controversy.

"Property Settlement Agreement

"This Agreement . . . by and between Joseph Eisinger, hereinafter referred to as the 'Husband', and Wilhelmina Eisinger, hereinafter referred to as the 'Wife'.

"Witnesseth:

"Whereas, the Wife has instituted an action for divorce against the Husband, and

"Whereas, the parties desire to settle all differences between them,

"Now, Therefore, in consideration of the premises and of the terms and conditions hereinafter set forth, It Is Agreed:

"2. The Wife shall have the custody of the children of the marriage, viz., Carl Eisinger . . . and Lloyd Eisinger. . . .

. . . . . .

"4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida . . . and weekly thereafter, and in consideration thereof the Wife agrees to support the

Aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon the death of the Husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage until such child shall attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the Husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 Dollars ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 ($62.50) per week.

"6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. This agreement constitutes a complete and final settlement of any and all claims, property rights, liabilities and obligations of the parties hereto in, on or as to each other, and each party shall have such rights in and to his or her person, earnings, income and property as though said parties had never been married to each other, save and except as herein provided, and each of the parties hereto, except as herein provided, renounces any and all claims for alimony, support, maintenance, attorney's fees and court costs which he or she might have against the other by reason of their marital status from this date henceforth.

"7. The Wife agrees that she will present this agreement to the Court with the request that the same be ratified, affirmed and approved by the Court as its own act and made a part of the final decree of divorce in the action hereinbefore described. . . ." [Tr. Rec. pp. 19-32.]

(d) The Points in Appellants' Argument.

In the Tax Court, appellants contended that the separation agreement provided for the payment of a lump sum each month to the former wife without specifying the amount to be applied for the support of the children. The Commissioner contended that the separation agreement must be construed in its entirety to determine whether any part of the amount paid to the wife represented an amount fixed as payments for the support of the minor children. The Court held that on the record, "the amount for the support of the children is identifiable", and gave judgment for Respondent [Tr. Rec. p. 44].

Appellants contend that construction of the instant agreement in its entirety leads to the inescapable conclusion that no part of the payments made under the agreement were for the support of the minor children within the meaning of Section 22(k) of the Internal Revenue Code. Following are the points in appellants' argument:

I.

The Tax Court Was Wrong in Holding Part of the Payments Made Were "Payable for the Support of Minor Children."

In the case of *Weil v. Commissioner,* 240 F. 2d 584 (2nd Cir. 1957), for the first time an appellate court has given careful consideration to the meaning of the words "payable for the support of minor children" as used in Section 22(k) of the 1939 Code. The facts and the decision of the court in the *Weil* case are as follows.

In 1940, as an incident to a decree of divorce, husband and wife entered into an agreement which, *inter alia,* provided in substance in Article 13 thereof that during the term of the joint lives of husband and wife,

> "in lieu of and in full payment, satisfaction and discharge of all obligations of the Husband for the support, maintenance and education of the children . . . [s]o long as the Wife shall attempt . . . to . . . fulfill the provisions . . . on her part to be performed . . . Husband shall pay the sums as provided in this Article in full payment of . . . all obligations . . . to support, maintain and care for the Wife and the children of the parties." (22 T. C. 612, 617 (1954).)

Under Article 13, the husband promised to pay the wife $9,600.00 per year which sum was to be increased to

$12,000.00 maximum or decreased to a minimum of $5,000.00 upon specified variations in the husband's income. No revision in payments was to be made in the event of death or majority of the children. Article 14, which was to be operative only in the event of wife's remarriage provided that:

> "(a) Husband shall pay to the Wife, for the support, maintenance and education of the children, the sum of $400 a month, so long as such children shall continue to reside with said Wife.
>
> "(b) In the event of the death or marriage of either child, or in the event either child no longer resides with the Wife, said payments shall be reduced by $200 per month for each such child." (22 T. C. 618.)

On this record, the Tax Court held that 50% of the payments made by the husband to the wife in the years in question were under the agreement payable for the support of the minor children. The Tax Court stated:

> "It has been held that an 'adequate consideration of the problem here presented requires a construction of the agreement as a whole, and the reading of each paragraph in the light of all the other paragraphs thereof.' *Robert W. Budd*, 7 T. C. 413, aff'd per curiam 177 F. 2d 198. It has been noted, also, that 'each case depends upon its own facts and specifically on the terms and provisions of the decree or written instrument.' *Warren Leslie, Jr.*, 10 T. C. 807, 810; *Harold M. Fleming*, 14 T. C. 1308. See, also *Mandel v. Commissioner*, 185 F. 2d 50. Cf. *Dora H. Moitoret*, 7 T. C. 640.
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> "Upon considering the entire agreement of August 9, 1940, considering each article and each subsection with the other, we conclude that the agreement fixes

a portion of the periodic payments, namely, 50 per cent, as a sum which is payable for the support of the two minor children, or 25 per cent, as a sum which is payable for the support of each minor child." (22 T. C. 621, 622 (1954).)

On Petition for Review, the United States Court of Appeals for the Second Circuit reversed the Tax Court on the issue discussed above and held that no part of the husband's payments were for the support of the minor children under the terms of Section 22(k) of the Internal Revenue Code. The following is an excerpt from the Second Circuit's opinion:

"Prior to the Revenue Act of 1942, alimony was not treated as part of the wife's taxable income. By Section 120 of that Act, however, certain alimony payments were included in her gross income and the husband was allowed an equivalent deduction. 56 Stat. 798, 816. But the statute excepts from its coverage that part of such payments 'which the terms of the decree or written instrument fix . . . as a sum which is payable for the support of minor children.'

"The Tax Court has held that the terms of the agreement now before us did 'fix' a part of the payments to be made by the husband thereunder as sums 'payable for the support of minor children.' We disagree.

"The cases construing and applying the terms of the statute have been numerous. In the bewildering maze of different types of separation agreements, containing a great variety of clauses requiring payments to the wife for her own maintenance and for the support of minor children, the Tax Court seems gradually to have drifted into a series of decisions,

including the one at bar, which conclude that a particular agreement does 'fix' sums 'payable for the support of minor children,' when it plainly does not.

"The key words of the statute are 'payable for.' The context of Section 22 demonstrates that the Congress used this phrase advisedly. The wife is not relieved of taxability on sums which she in fact expends for the support of minor children, but only on such sums as 'the terms of the * * * instrument fix * * * as * * * payable for' that purpose. The statute taxes to the wife sums which are available for her own use or benefit—whether or not she has undertaken to support the minor children—and does not tax to the wife sums she is required to devote exclusively to the support of the children. What vitiates the decision of the Tax Court in this case is its holding that sums may be 'payable for the support of minor children,' even though the wife may be free to use them for other purposes.

"Despite two decisions seemingly to the contrary, *Henrietta S. Seltzer*, 22 T. C. 203, and *Dorothy Newcombe*, 10 T. C. M 152, aff'd on another point, 9 Cir., 203 Fed. (2d) 128; the Tax Court has, in a series of cases culminating in the case at bar, adopted the position that it is enough if anywhere in the instrument there is mentioned a sum thought to be appropriate for the support of minor children under some circumstances. This erroneous principle emerges from the cases, although they do not articulate any basis for distinguishing between sums 'payable for the support of minor children' and sums not so payable. Rather, they proceed upon the false assumption that, whenever sums are to be paid for the support of both the wife and the children, some

portion must be 'payable for' the children, and that it is the duty of the court to go over the instrument with a fine-tooth comb to discover a figure which might be used as a basis for a division of the tax burden. That such was the approach of the Tax Court in this case appears unmistakably from a reading of its opinion. See 22 T. C. 612.

"We hold that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein. This cannot be the case if the terms of the instrument contemplate a continuance of the payments to the wife after she has ceased to support the children. The fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurs, will not suffice to shift the tax burden from the wife to the husband.

"We now turn to the agreement to see whether, in the light of the principles just stated, its terms fix any amount as payable for the support of minor children.

". . . We think it plain that the wife undertook the obligation of supporting the children as part of the consideration on her part and that the husband undertook to make payments to the wife as part of the consideration on his. In these circumstances one would not expect to find in the agreement any requirement that the wife devote a particular portion of the payments to the support of the children; and there is none.

"Except in the remarriage clause, the agreement nowhere requires the wife to devote any specified amount to the support of the children, nor, unless she remarries, are the payments to her to be reduced if it becomes no longer necessary for her to support either or both of the children. . . .

"We agree with the statement of the Commissioner in his brief that in order to sustain the determination of the Tax Court, it is necessary to find in the agreement 'sufficient provisions showing an intention on the part of Charles Weil to provide for his minor children specifically, as distinct from an intention to provide for his former wife and have her in turn provide for the children'. But we are convinced that the agreement contains no such provisions. It is quite true that the agreement must be read as a whole, *Mandel v. Commissioner,* 7 Cir., 185 Fed. (2d) 50; *Budd v. Commissioner,* 6 Cir., 177 Fed. (2d) 198, and that no particular formula, such as the phraseology we have quoted from Section 22(k), is necessary. This particular instrument, however, must be construed as expressing the husband's intention to make payments to the wife and have her support the children, the very converse of what the Commissioner states is necessary to support the orders of the Tax Court in these cases." (240 F. 2d 587-588.)

Appellants contend that in the *Weil* case, the Second Circuit announced the true meaning and application of Section 22(k), and urges this Court to express its approval of and concurrence with the Second Circuit decision.

The Second Circuit held that "sums are 'payable for the support of minor children' when they are to be used

for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein." (240 F. 2d 588.) In the instant case, nowhere in the agreement between appellant Jo Eisinger and his former wife is the use of any part of the $125.00 per week restricted to the support of the minor children only, but on the contrary, in return for the wife's agreeing to support the minor children, she is given unrestricted use of the money paid to her.

Appellants contend that as in the *Weil* case, here too it is "plain that the wife undertook the obligation of supporting the children as part of the consideration on her part and that the husband undertook to make payments to the wife as part of the consideration on his. In these circumstances one would not expect to find in the agreement any requirement that the wife devote a particular portion of the payments to the support of the children; and there is none." (240 F. 2d 588.)

Note also, that the Tax Court in the instant case was guilty of the exact same conduct criticized by the Second Circuit. In speaking of the Tax Court cases culminating in *Weil v. Commissioner,* the court stated that

> ". . . they proceed upon the false assumption that, whenever sums are to be paid for the support of both the wife and the children, some portion must be 'payable for' the children, and that it is the duty of the court to go over the instrument with a fine-tooth comb to discover a figure which might be used as a basis for a division of the tax burden. That such was the approach of the Tax Court in this case appears unmistakably from a reading of its opinion. . . ." (240 F. 2d 584-588.)

And, that such was the approach of the Tax Court in the instant case is certain. The court stated

> "[o]n this record, we hold that the amount for the support of the children is identifiable, and . . . [i]t follows that the determination of the respondent [Commissioner of Internal Revenue] . . . must be sustained." [Tr. Rec. p. 44.]

Nowhere is there a finding by the Tax Court, nor is there anything in the record which would support a finding that any part of the payments made by appellant Jo Eisinger to Wilhelmina Eisinger was to be used only for the purpose of supporting the minor children. On the contrary, the record demonstrates beyond a reasonable doubt that no such promise was extracted from Wilhelmina Eisinger, nor was any such promise made by her.

Here two points should be noted. First, the agreement provides

> "Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week . . . and in consideration thereof the Wife agrees to support the . . . children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony." [Tr. Rec. p. 28.]

That is in the event of the wife's breach thereof by failure to support either or both of said children, the husband may pay the cost thereof and deduct the costs from the alimony. It is interesting that *here there is no provision for fixed reduction of payments to the wife, but merely for the husband to deduct actual costs of support.* Second, the agreement without deviation refers to payments to the wife as "alimony". Alimony is defined as an allow-

ance made for the support of the wife where there exists a divorce or legal separation. (27 C. J. S., Divorce, Sec. 202, p. 883.) Both of these points lead to the inevitable conclusion that no part of the payments provided to be paid to the wife were intended to be applied by the wife for the support of the children and that the agreement did not require the wife to apply any part of said payments for their support. Thus, under the *Weil* case, no part of the payments were for the support of minor children, and the Tax Court conclusion that part of the payments made were for such support was erroneous.

II.

All of the Decisions Cited and Relied Upon by the Tax Court Were Based on a Misconstruction of the Words "Payable for the Support of Minor Children."

In its decision in the instant case, the Tax Court cited and relied upon *"Robert W. Budd,* 7 T. C. 714, aff'd per curiam, 177 F. 2d 198; *Warren Leslie, Jr.,* 10 T. C. 807; *Mandel v. Commissioner,* 185 F. 2d 50. . . ." [Tr. Rec. p. 44.] In each of these cases, without discussion thereof, the court placed a construction on the words "payable for the support of minor children" in Section 22(k) of the 1939 Internal Revenue Code which is completely incompatible with the construction given thereto in *Weil v. Commissioner,* 240 F. 2d 584 (2nd Cir. 1957). Appellants assert that in those cases, the courts failed to give adequate attention to the words of the statute, and consequently fell into error in concluding that parts of the payments made therein were "payable for the support of minor children." Briefly, the circumstances in each of these cases cited by the Tax Court are as follows:

Robert W. Budd, 7 T. C. 413 (1946), Affirmed Per Curiam, 177 F. 2d 198 (2nd Cir., 1947).

The husband and wife entered into a separation agreement which was incorporated into a decree of divorce providing that so long as the wife remained single, the husband was to pay her $500.00 per month "for her support and for alimony, and the support of Robert Ralph Budd until he is ready to enter college to complete his education." (7 T. C. 414.) The agreement further provided that should the wife remarry, payment to her "for the maintenance, care, education and support" of the minor child was to be $200.00 per month until the child was ready to enter college, and, in the event of death of the child or upon attaining age 21, the husband was to pay the wife $300.00 per month as long as she remained single. On the wife's divorce, the court ordered compliance with the agreement. The Tax Court held that $2,400.00 a year of the $6,000.00 paid the wife was for child support. The court stated that when the agreement is read "as a whole" and each paragraph is read "in the light of all the other paragraphs thereof . . . it seems to us apparent that . . . the sum of $2,400.00 represented an amount fixed by the terms of the agreement . . . as a sum payable for the support of petitioner's minor child, and we have so found." (7 T. C. 413, 417.) On appeal, the Court in a *per curiam* opinion, affirmed the Tax Court decision. (*Budd v. Commissioner*, 177 F. 2d 198 (6th Cir. 1947).) In neither opinion does the court discuss the meaning of "payable for the support of minor children," but, seems to assume that whenever any term in the agreement can be seized upon as indicating that part of the payment *may have* been thought of by the parties

as compensation to the wife for supporting the child, that part is not deductible under Section 22(k). There is no evidence in the reports that the agreement required the wife to expend any part of the sums paid to her only for the child's support.

Warren Leslie, Jr., 10 T. C. 807 (1948).

The husband agreed to make payments to his wife based on a percentage of his income so long as the wife was alive and not remarried, "for her personal support and maintenance and for the support and maintenance of the . . . children." (10 T. C. 808.) The agreement also provided for the husband to support the children upon the death or remarriage of the wife.

> ". . . [H]owever . . . the payments to the wife for her personal support and maintenance and for the support and maintenance of the . . . children shall in no event be less than the sum of Thirty-six Hundred Dollars ($3,600.00) per anum (sic) but in the event of the remarriage of the wife the sum for the maintenance of the children shall not be less than Twenty-four Hundred Dollars ($2,400.00) per annum." (10 T. C. 809.)

In the years in question, the minimum $3,600.00 was paid by the husband. Relying on a "construction of the agreement as whole" and in particular upon the fact that during the years in dispute, the minimum payments of $3,600.00 were made, thus "invoking in part" the last quoted sentence of the agreement, the Court held that $2,400.00 was not deductible by the husband because it was "payable for the support of minor children." Again, the opinion reveals neither a finding of fact nor any facts which would sup-

port a finding that the wife was obligated by the agreement to apply any specific part of the payments made to her for the support of the minor children.

Mandel v. Commissioner, 185 F. 2d 50 (7th Cir., 1950).

By agreement incident to a divorce decree, the husband agreed to pay the wife $18,000.00 per year at the rate of $1,500.00 per month for her life "for the support and maintenance of the wife and their two children." However, in the event of the remarriage of the wife, payments to her were to be reduced to $833.33 per month, and if a child died, payments were to be reduced by $416.66 for each child so dying. On returns for the years in question, the husband only sought to deduct $8,000.00 for alimony paid to the wife of the $18,000.00 paid each year. In the Tax Court the husband first claimed he could deduct the full $18,000.00 for each year on the theory that no part was "payable for the support of minor children." The Court of Appeals for the Seventh Circuit affirmed the Tax Court interpretation "that the agreement as a whole sufficiently earmarked and designated $10,000 of each annual payment for the support of the children." (185 F. 2d 52.) As in the other cases cited by the Tax Court in its decision in the instant case, there are no facts to support a finding, nor is there a finding that the wife was obligated to apply any part of the payments made to the support of the children. Thus, as in the *Budd* and the *Leslie* cases, *supra,* the Court misconstrued the meaning of "payable for the support of minor children" and thereby came to an incorrect conclusion, that is, one at variance with that reached by the Court of Appeals for the Second Circuit in the *Weil* case.

In addition, appellants feel that the decision in *Mandel v. Commissioner* may be distinguished on the basis of what the Seventh Circuit subsequently said about that case in *Joslyn v. Commissioner,* 230 F. 2d 871 (7th Cir. 1956). In discussing *Mandel,* the Court said:

> "There, we construed a separation agreement which contained provisions apparently in conflict. In one provision the husband was required to pay $18,000 for the support of his wife and children; *another provision, however, designated the amount which the wife was required to use for the support of the children.* Thus, it was merely a matter of calculation to determine the portion of the total which was payable to the wife as alimony." (Emphasis added.) (230 F. 2d 879.)

If the court based its decision on a finding that a certain sum was designated "which the wife was required to use for the support of the children," then the *Mandel* case is completely compatible with *Weil v. Commissioner, supra.* However, since in the instant case, there is no such finding of fact, nor any provision from which the Court could find that the wife was required to use any specific amount for the support of the children, on the basis of this interpretation of the *Mandel* decision, the Tax Court should have concluded that no part of the payments made herein were for the support of minor children, and held for the appellants.

III.

Properly Construed, the Property Settlement Agreement and the Divorce Decree Embodying It Provide Only for Alimony Payments to the Wife.

Appellants assert that properly construed, the property settlement agreement as embodied in the divorce decree provides that the payments made to the wife thereunder are payments of alimony, and not for support of the minor children. Reference is made to the relevant terms of the agreement as set forth *supra,* page 11.

Essentially a separation and property settlement agreement such as the one entered into between appellant Jo Eisinger and his former wife, Wilhelmina, is a bargaining transaction whereby the parties thereto seek to settle their respective claims to property, and to adjust and settle the rights to support and maintenance, of the wife and the minor children. See *e. g., In re Yoss' Estate,* 237 Iowa 1092, 24 N. W. 2d 399, 401 (1946); *Weimar v. Weimar,* 25 N. Y. S. 2d 343, 346 (1940); *Denner v. Denner,* 69 N. Y. S. 2d 188, 192; 189 Misc. 484, 487 (1947). The primary rule of construction of contracts is that the court must, if possible, give effect to the mutual intention of the parties. *Wilson v. Brown,* 5 C. 2d 425, 428, 55 P. 2d 485, 486 (1936); *Lemm v. Stillwater Land and Cattle Co.,* 217 Cal. 474, 480, 19 P. 2d 785, 788 (1933); 17 C. J. S. Contracts, Section 295. In construing a written contract, the instrument itself is the first and highest evidence of the intent of the parties in executing it. *Sawyer v. San Diego,* 138 Cal. App. 2d 652, 661, 292 P. 2d 233, 238 (1956); *Davis v. Basalt Rock Co.,* 114 Cal.

App. 2d 300, 303-304, 250 P. 2d 254, 256 (1952). And even if any uncertainty exists as to the meaning of a written contract, "the first rule to be observed is that its interpretation must be determined by its own language." *Canavan v. College of Osteopathic Physicians and Surgeons,* 73 Cal. App. 2d 511, 518, 166 P. 2d 878, 882; (1946); *Hunt v. United Bank and Trust Co.,* 210 Cal. 108, 115, 291 Pac. 184, 187 (1930). It is appellants' position that the Eisinger agreement, as demonstrated by the following factors and provisions therein contained, provides *only* for payments of alimony.

1. At all times, payments to the wife are referred to as alimony [Tr. Rec. pp. 19-30].

2. In consideration of the agreement of the husband to pay the wife $125.00 per week, the wife agrees to support the children [Tr. Rec. p. 28].

3. If the wife fails to support the children, the husband may pay the cost thereof and deduct same from the weekly alimony. Note: The husband retains the right to deduct actual costs, his damages in the event of wife's breach; not any fixed sum [Tr. Rec. p. 28].

4. If "Husband shall be called upon to pay any claim asserted against him by reason of a debt incurred by the Wife, he may stop paying the alimony provided for . . . until the weekly alimony shall have aggregated the amount of such claim or claims" [Tr. Rec. p. 30].

5. "The parties have incorporated in this agreement their entire understanding. No oral statements nor prior written matter extrinsic to this agreement shall be in force or effect" [Tr. Rec. p. 26].

6. Nowhere does the agreement provide for any specific sum to be applied by the wife to the support of the children.

7. Nowhere does the agreement specifically provide that payments to be made to the wife are for "support of children" except, in the event of the wife's remarriage, the husband agrees to pay *in lieu of alimony payments,* $31.25 per week for support and maintenance of each child [Tr. Rec. p. 28].

On the other hand, only two provisions of the agreement can be used as the basis for arguing that part of the payments were intended for child support.

8. Upon remarriage of the wife, all alimony payments cease, but *"in lieu thereof,"* the husband agrees to pay $31.25 per week for support and maintenance of each minor child [Tr. Rec. p. 28].

9. "Alimony" to be reduced $31.25 per week upon death or upon attainment of age 21 by either child [Tr. Rec. p. 29].

The first of these (8) is not operative until the wife remarries. Thus, payment for support and maintenance of the children will not occur until a more or less uncertain future event takes place. Then, it is conceded, the husband may not deduct the payments made. However, during the years in question herein, the wife had not remarried. Thus this clause was inoperative, and should have been disregarded by the Tax Court in its attempt to determine whether the payments provided for were alimony or for child support. As was stated by the court in *Weil v. Commissioner, supra,* "[t]he fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurs, will not suffice to shift the tax burden from the wife to the husband." (240 F. 2d 588.) (See also, *Warren Newcombe v. Commissioner,* 10 T. C. M. 152 (1957), and

the quotation therefrom set forth below, at page 35) Appellants contend that this clause should not be relied on to show that the agreement provided for payments for child support for another reason. Undoubtedly the husband's intent in providing that the payments were to be for support and maintenance of the children upon the wife's remarriage was to prevent the wife from using the payments thereafter for her own support. This provision convincingly indicates that prior to the time the wife remarried, the husband did not intend to restrict her use of the payments or any part thereof to the support of the children. That is, by expressly providing that upon the occurrence of a certain future event, the money payable would be specifically for the support and maintenance of the children, the husband impliedly indicated that prior thereto, no part of the payments were to be specifically for the maintenance and support of the children.

Thus, the only factor listed upon which the Tax Court ought to have relied in reaching its conclusion that part of the sums were "payable for the support of minor children" is the fact that payments of alimony were to be reduced by $31.25 upon death or attainment of age 21 of either child. Appellants agree that a permissible inference may be drawn from this provision that the parties had in mind that the support of each child would amount to $31.25 per week. However, this is not the only inference that can be drawn. There may have been *other* reasons for the reductions at the specified times. There is nothing in Section 22(k) that prohibits reductions in payments upon specified future events occurring. In the bargaining process, other factors may have been considered such as the future needs of the wife, the future earning capacity of the husband, and the fact that when it became no

longer necessary for the wife to care for the children, it would be possible for her to go to work and obtain an income of her own. In any event, in view of all the factors listed above militating against a finding that part of the payments were for child support, it is difficult for appellants to understand how the Tax Court could have come to the conclusion that, on the basis of the facts, part of the payments were "for the support of minor children" within the meaning of Section 22(k) of the 1939 Code.

Appellants maintain that the provisions of the property settlement agreement here under consideration set up payments which are entirely alimony. In support of this, appellants point to the express terms of the property settlement agreement hereinbefore set out and discussed, and incorporated into the divorce decree as follows:

> ". . . the same is hereby confirmed and adopted by the Court, and the parties hereto are
>
> "ORDERED AND DIRECTED to abide by and fully perform the terms of this settlement in this decree." [Tr. Rec. p. 32.]

In particular, appellants refer to the discussion above and emphasize the fact that the husband did not promise to pay money for the support and maintenance of the children except in the contingency of the remarriage of the wife before death, or attainment of age 21, by both children. And, the decree merely ordered the husband to perform the terms of the settlement, that is, to pay alimony. Appellants assert that this is a vital factor precluding the correctness of any finding that the payments made to the wife were not entirely alimony.

IV.

The Case Law Favoring Appellants' Contention That the Tax Court Erred in Finding Part of the Payments Were for the Support of Minor Children.

In *Dora H. Moitoret v. Commissioner,* 7 T. C. 640 (1946), the separation agreement which was confirmed in the divorce decree, provided for the husband to pay the wife "for her care and support and the care and support of minor children, the sum of $250.00 each month. . . ." (7 T. C. 741.) The petitioner (the wife) claimed that the money was intended for child support and used therefor by her. The Court held all to be alimony, stating:

> "Here the alimony in question was payable to the petitioner for her own care and support and for the care and support of the minor children. Hence, it may not be said that the decree or written instrument fixed an amount payable by the husband for the support and care only of his minor children." (7 T. C. 642.)

In *Henrietta S. Seltzer v. Commissioner,* 22 T. C. 203 (1954), the separation agreement bound the husband to pay the wife the sum of $120.00 per month "for the support and maintenance of herself and the two sons." The agreement further provided that if the parties divorced or separated in a jurisdiction other than New York, the judgment would incorporate the agreement, and, that in such event, the husband would pay the wife "for the support and maintenance of herself and the sons the sum of One Hundred Twenty Dollars ($120.00) per month until both have reached their majority. . . ." and, upon remarriage of the wife, the "husband shall pay to the wife the sum of Ninety Dollars ($90.00) per month for

the support and maintenance of the sons." The divorce was obtained in New York.

The court in the *Seltzer* case held that the full $120.00 per month paid to the wife was alimony and therefore taxable as income to her. The court stated that "[n]owhere in the divorce decree itself is any part of the $120 a month designated for the support of the two minor sons. Nor do we think that when the divorce decree is read in connection with the separation agreement that it can be said that any part of the $120 monthly payments has been designated for the support of the two minor sons." (22 T. C. 208.)

It is submitted that the *Moitoret* and *Seltzer* cases are authority upon which this Court should find that the instant agreement did not provide payments for child support. As in the *Moitoret* case, "the decree or written instrument" did not fix "an amount payable . . . for the support and care only of . . . minor children." And as in the *Seltzer* case, no part of the payments made were "designated" for the support of minor children by the decree or the written agreement.

In *Elsa B. Chapin v. Commissioner,* 6 T. C. M. 882 (1947), the separation agreement incorporated into the decree of divorce provided:

> "Third: Support and Maintenance.
>
> A. The Husband shall pay to the Wife for her maintenance and support and for the maintenance and support of the daughters:
>
> '(i) The sum of six thousand dollars ($6,000) per annum in equal monthly installments in advance, commencing on the 2nd day of May, 1941.'
>
> . . .

"(iii) If the marriage between the parties hereto should hereafter be duly dissolved and the Wife should remarry, then the Husband shall not be obligated thereafter to make the payments specified in subdivisions (i) and (ii) above, but if any of the daughters are then still minors, he shall pay to the Wife the following: For each daughter who is then still a minor, the sum of $2,000 per annum for her support and maintenance, such payments to be made in equal quarterly installments in advance, commencing on the date of the remarriage of the Wife and to end in the case of each daughter upon her attaining the age of twenty-one years.'" (6 T. C. M. 833.)

The opinion disclosed no provisions for reduction of the periodic payments to the wife upon the death of any of the three children or upon arrival of any child at the age of twenty-one. Construing the aforesaid provisions, the Court made the following very pertinent analysis:

"The provisions of subparagraph (iii) do not show that $2,000 was to be for the support of each daughter under (i) and that none of the $6,000 was in discharge of a legal obligation towards the wife. It is improper to say under all of the terms of the agreement that no part of the $6,000 was in discharge of a legal obligation of the husband to maintain and support his wife. The law does not permit an allocation, in such cases, but expressly provides that the entire payment shall be included in the income of the wife since no specific part or amount was fixed as payable for the support of the minor children." (6 T. C. M. 884, 885.)

In *Warren Newcombe v. Commissioner,* 10 T. C. M. 152 (1951), it appeared that, pursuant to a divorce decree, the petitioner was required to pay his former wife three-sevenths of his net earnings for a nine-year period for

her support and maintenance, and the support and maintenance of their two minor children. Upon expiration of the nine-year period, or in the event the wife remarried sooner, he was obligated to pay her $100 per month for each child until said child attained the age of eighteen years and thereafter until each child secured a college education or professional training. The Commissioner determined that $2,400 of the annual periodic payments were for support of the two children and hence not deductible as alimony under Section 23(u) of the Code. The Court, in overruling the Commissioner, and finding for the husband, said in part:

> ". . . The obligation to make these payments of $100 per month for each of his children did not arise until after the 9-year period had expired, if Hazel remained unmarried, or if she married during the 9-year period, then his obligation to make periodic payments to Hazel ceased, and his obligation to pay her $100 per month for the maintenance and support of each child arose. *These provisions for maintenance and support of his children are entirely separate and apart, therefore, from his agreement to pay his divorced wife three-sevenths of his net earnings for her maintenance and support and the maintenance and support of their children for the 9-year period or until she remarried during that time.*" (10 T. C. M. 152, 157, aff'd 203 F. 2d 128.) (9th Cir. 1951.) (Italics added.)

The *Chapin* and *Newcombe* cases demonstrate that the factor of forfeiture of alimony upon remarriage by the wife, and the substitution therefore of payments specifically for the support and maintenance of minor children does not require the court to find that part of the payments to the wife before she has remarried are "for the support of minor children."

In *Rubin v. Riddell,* .... F. Supp. ...., 56-2 U. S. T. C. ¶9891 (S. D. Calif., 1956), a decree of divorce required the husband to pay $700.00 per month for the support and maintenance of his former wife and children. The judgment further provided for the husband to pay $200.00 per month less while the children were in his custody. During the years in question, the Commissioner refused to permit the husband to deduct $700.00 per month of the sums paid the wife for the months the children were in her custody, asserting that $200.00 per month of said sum was "paid specifically for the support of said minor children." The husband paid the deficiency assessed and sued in the District Court for refund. The Court held for the husband on the ground that the assessment and collection of the tax was erroneous and illegal, and the full amount of sums paid the wife was deductible within the meaning of the Internal Revenue Code. This case is further authority for the conclusion that the mere fact that the Court can isolate some provision of the agreement or decree upon which it can base an inference that part of the payments payable to the wife may have, within the contemplation of the parties been a sum adequate for the support of the children, is not sufficient for it to find that part of the sum payable was for the support of minor children within the meaning of Section 22(k) of the 1939 Internal Revenue Code.

The case of *Truman W. Morsman v. Commissioner,* 27 T. C. 520 (1956), is authority for the proposition that the fact that payments are to cease entirely upon death or attainment of majority by the children is not sufficient for the Court to conclude the payments are entirely for support of children. In this case, the wife was to be paid $350.00 per month in full discharge of her support of the

child. Under the decree, the child was to spend 6 months with each parent during each year, but when the child was with the father, payments to the mother were to be only $300.00. If the wife remarried, payments were to be reduced to $100.00 per month while the child was with the mother, and $50.00 per month while with the father. In the year in question the husband paid the wife $1,200.00. The Commissioner contended that the entire $1,200.00 was for the support of the child because all payments were to be discontinued completely if the child died or attained his majority. Although the Court's decision that $600.00 of the $1,200.00 paid was for child support and therefore includible in the husband's income is questionable in view of *Weil v. Commissioner, supra,* and the discussion above, the Court's refusal to hold that 100% of the payments was for the support of the child is a clear recognition of the fact that a clause such as the one in the instant case which provides for discontinuance, or reduction of payments upon the death or attainment of majority by the children does not lead inevitably to the conclusion that part or all of the payments provided for were "for the support of minor children."

To summarize, the following general propositions may be derived from the cases discussed in this section:

1. The fact that upon the wife's remarriage, alimony payments are to cease and, as a substitute therefor, payments for the support of minor children in a specific amount are to commence, does not require a finding that some part of the payments made before the wife's remarriage are in reality for the support of minor children.

2. The fact that unsegregated payments made for the support of both the wife and children are to be reduced by a fixed amount upon contingencies which relieve the wife

temporarily or permanently of the necessity of supporting the children, does not require a finding that said fixed amount was "payable for the support of [the] minor children."

It is submitted that on the basis of the cases and the propositions derived therefrom, the Tax Court in the instant case eroneously decided that any part of the payments were for the support of minor children.

Appellants are fully aware that there are cases, in addition to those cited by the Tax Court and discussed above, whose decisions apparently are contrary to appellants' position. However, after analyzing these cases, appellants are convinced that each one may be distinguished from the instant case either on the basis of the facts involved or on the basis that the court erroneously defined the words "payable for the support of minor children." Appellants therefore will not extend the length of this brief in an effort to distinguish each of said cases.

Conclusion.

The decision appealed from should be reversed; appellants should be allowed full deduction for all payments made by appellant Jo Eisinger to his former wife, Wilhelmina Eisinger, that is $3,850.00 during 1949, and $6,729.00 during 1950, respectively.

Respectfully submitted,

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No. 15387

In the United States Court of Appeals for the Ninth Circuit

JO EISINGER AND LORAIN B. EISINGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 41-45) is not officially reported.

JURISDICTION

This petition for review (R. 53-55) involves deficiencies in federal income taxes for the calendar years 1949 and 1950 in the respective amounts of $2,458.22 and $925.76 (R. 45-49). A notice of deficiency was mailed to the taxpayers on January 29, 1953. (R. 12-18.) Within ninety days thereafter and on April 17, 1953, the taxpayers filed a petition for redetermination of those deficiencies under the

provisions of Section 272(a) of the Internal Revenue Code of 1939. (R. 3, 5-33.) The decision of the Tax Court was entered on June 13, 1956. (R. 52.) By an order of the Tax Court dated October 12, 1956, the taxpayers were granted an extension of time to December 9, 1956, for filing the record on review and docketing the petition for review. (R. 57.) The case is brought to this Court by a petition for review filed by the taxpayers [1] on September 10, 1956. (R. 53-55.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

The taxpayer was divorced from his first wife, Wilhelmine, by a decree of a local court of the State of Florida in 1949. At that time they were the parents of two minor sons. The decree of divorce incorporated in it a property settlement agreement between the taxpayer and Wilhelmine. Under the agreement the taxpayer was to pay Wilhelmine $125 a week but (1) as each child reached the age of twenty-one the $125 weekly payments were to be reduced by $31.25, (2) if either child died before he reached his majority, the $125 weekly payments were to be reduced by $31.25, (3) if both children died before reaching their majority, Wilhelmine was to receive $62.50 a week, (4) when both children reached the age of twenty-one, Wilhelmine was to receive only

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[1] Since Lorain B. Eisinger, the present wife of Jo Eisinger, is involved solely because of the filing of joint returns for the taxable years, her husband hereinafter will be referred to, individually, as the taxpayer.

$62.50 a week, (5) if Wilhelmine remarried, "alimony" payments were to cease and in lieu thereof the taxpayer was to pay $31.25 a week for the support of each child, and (6) if Wilhelmine failed to support the two children, the taxpayer had the right to pay the cost thereof and deduct it from the $125 weekly payments.

The question is whether the Tax Court correctly held that, on these facts, an amount of the payments made by the taxpayer to his former wife ($62.50 of the $125 weekly payments) was specified as a sum which was payable for the support of the taxpayer's minor children and, therefore, that amounts so specified were not deductible by the taxpayer as amounts expended for the support of his former wife under the provisions of Sections 23(u) and 22(k) of the 1939 Code.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * *

(k) [As added by Sec. 120(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or

incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(u) [As added by Sec. 120(b), Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22 (k), amounts includible under section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22(k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—(a) *In general.*—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797(a)(17).

* * * *

(d) *Payments for support of minor children.*—Section 22(k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. * * *

Sec. 29.23(u)-1. *Periodic Alimony Payments.*—A deduction is allowable under section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under section 22(k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22(k)-1. (For definition of husband and wife in such cases, see section 3797(a)(17).)

* * * *

STATEMENT

The facts as stipulated (R. 35-40) and as found by the Tax Court (R. 41-44) may be summarized as follows:

The taxpayer filed joint returns with his second wife, Lorain, for 1949 and 1950, the taxable years involved, with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles. (R. 41.)

Pursuant to a decree granted May 26, 1949, by the Circuit Court of Dade County, Florida, the marriage of the taxpayer to Wilhelmine Eisinger was dissolved. At that time they were the parents of two minor sons, Carl and Lloyd, sixteen and ten years of age, respectively. (R. 42.)

A written property settlement agreement dated March 28, 1949, and modified on May 19, 1949, was incorporated in the decree of divorce. (R. 42.) The agreement read, in pertinent part, as follows (R. 42-43):

> 4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida, and in and for Dade County, in Chancery, No. 112550-C, and weekly thereafter, and in consideration thereof the Wife agrees to support the aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said

weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon the death of the husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage until such child shall attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week, during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 Dollars ($62.50) per week.

* * * *

6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. * * *

The Commissioner disallowed the sum of $1,925 in 1949 and the sum of $3,364.50 in 1950 of the total amounts claimed as deductions for alimony payments by the taxpayer on the ground that such amounts were paid for the support of his minor children. (R. 43-44.)

The Tax Court, by its opinion, upheld the action of the Commissioner. (R. 41-45.)

A review of the matter thus presented is sought by the taxpayer before this Court. (R. 54-55.)

SUMMARY OF ARGUMENT

In reaching its conclusion that the agreement between the taxpayer and his former wife, Wilhelmine, fixed a portion of the periodic payments ($62.50 of the $125 weekly payments) as sums payable for the support of their minor children, the Tax Court properly construed the agreement as a whole. So read, the agreement throughout evidences a separation between the taxpayer's obligations to his former wife and those to his children. Thus, the agreement reduces the periodic payments by a *fixed* sum ($62.50) when the wife remarries, continuing the payments for the support of the children ($62.50) thereafter; it reduces the payments, by a fixed sum ($62.50), whether or not the wife remarries, when it becomes

no longer necessary to support the children (*viz.*, upon their death) or when the taxpayer no longer would be under an obligation to support his children (*viz.*, when they reach their majorities), in which latter two events the reduction in payments is made without reference to the needs of the wife. Moreover, in each one of these circumstances the agreement fixes the portion of the $125 weekly payments for wife support at $62.50.

On these facts, Sections 23(u) and 22(k) of the 1939 Code, and the cases which have construed them, deny to the husband (the taxpayer here) a deduction for the sums allocable to the support of his children as distinct from the sum fixed for the support of the wife. Accordingly, the Tax Court correctly denied the taxpayer the right to deduct $62.50 of the $125 weekly payments made under the agreement in question.

ARGUMENT

The Tax Court Correctly Held That the Sum of $62.50 A Week Was Fixed By the Property Settlement Agreement As Payable for the Support of the Taxpayer's Minor Sons and, Therefore, Not Allowable As a Deduction Under Section 23(u) of the Internal Revenue Code of 1939

Section 23(u) of the Internal Revenue Code of 1939, *supra*, provides that a husband who is divorced or legally separated from his wife may deduct, in computing his net income, payments made by him to his wife which are includible in her gross income under Section 22(k). Generally, Section 22 (k) of the 1939 Code, *supra*, provides that a wife

who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance shall include in her gross income periodic payments received subsequent to such decree. And, in requiring the inclusion of periodic payments of alimony in her gross income, Section 22(k) provides that:

> This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband.

The clear purpose of Sections 23(u) and 22(k) was to relieve the husband of tax only on that portion of a periodic payment which was not designated or identified in the divorce decree or written instrument incident thereto as destined for support of his minor children. In this connection, it must be kept in mind that the provisions in question were relief measures only to the limited extent of periodic *alimony* payments. The general intention was to tax the wife on the amount of money given to her for her support and, to that extent, permit deduction thereof by the husband. Therefore, where, from the divorce decree or written instrument incident thereto, an amount can be ascertained as allocable to the support of children, the wife is not required to include in her gross income those amounts not received by her for her support. *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th); *Budd* v. *Commissioner*, 177 F. 2d 198 (C.A. 6th); *Joslyn* v. *Commissioner*,

230 F. 2d 871, 879 (C.A. 7th); *Morsman* v. *Commissioner*, 27 T. C. 520; *Gantz* v. *Commissioner*, 23 T. C. 576; *Fleming* v. *Commissioner*, 14 T. C. 1308; *Leslie* v. *Commissioner*, 10 T. C. 807; *Fisher* v. *Commissioner*, decided April 30, 1956 (1956 P-H T. C. Memorandum Decisions, par. 56,098); *Ball* v. *Commissioner*, decided April 13, 1955 (1955 P-H T. C. Memorandum Decisions, par. 55,084); *Neuwahl* v. *Commissioner*, decided July 21, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,206); *Mackay* v. *Commissioner*, decided January 26, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,032); *Hicks* v. *Commissioner*, decided June 19, 1953 (1953 P-H T. C. Memorandum Decisions, par. 53,216); *Swallen* v. *Commissioner*, decided May 22, 1951 (1951 P-H T. C. Memorandum Decisions, par. 51,149); Treasury Regulations 111, Section 29.23(u)-1, *supra;* H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 46, 71-72, 73-74 (1942-2 Cum. Bull. 372, 409, 429); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 83-87 (1942-2 Cum. Bull. 504, 568-570).

In accordance with the stated Congressional purpose, it is held that, in identifying the portion of periodic payments allocable to the support of minor children, it is proper to consider provisions for a reduction in payments to the wife in the case of the death of a minor child, in case of a minor child reaching his majority, and in case of the remarriage of the wife. To be sure, one such provision indicating an amount destined for support of a child may be overcome by other provisions found in the same instrument—since, in the final analysis, the question

is merely whether under the agreement a specific amount is identified as *payable* for the support of children, and, in deciding this issue, the instrument involved must be read as a whole, a single sentence, phrase, or word not being decisive. *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th); *Budd* v. *Commissioner*, 7 T. C. 413, affirmed *per curiam*, 177 F. 2d 198 (C.A. 6th); *Weil* v. *Commissioner*, 240 F. 2d 584 (C.A. 2d), certiorari denied, May 13, 1957; *Joslyn* v. *Commissioner*, *supra; Morsman* v. *Commissioner*, *supra; Gantz* v. *Commissioner*, *supra; Fleming* v. *Commissioner*, *supra; Leslie* v. *Commissioner*, *supra; Fisher* v. *Commissioner*, *supra; Ball* v. *Commissioner*, *supra; Neuwahl* v. *Commissioner*, *supra; Mackay* v. *Commissioner*, *supra; Hicks* v. *Commissioner*, *supra; Swallen* v. *Commissioner*, *supra.*

In the present case the pertinent portions of the agreement under inquiry are found in paragraphs 4 and 6 (a). (R. 28-29, 42-43.)

Paragraph 4 of the agreement begins with the following general provision (R. 28, 42): "The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week * * *." The taxpayer appears to contend (Br. 21-22, 28-29, 31) that it is this provision that is decisive in answering the question here involved. He asserts (Br. 21-22) that "Alimony is defined as an allowance made for the support of the wife". With this latter proposition we entirely agree, and it is, of course, obvious that the provision quoted does not specify what portion of the payments was intended for the children's support. But in the same

paragraph (4) the parties give their own meaning to the term "alimony".[2] (R. 28-29.) And, under the principles of construction here applicable (i. e., that we must look to the whole instrument, and the familiar doctrine of *ejusdem generis*) it is made clear that the sum of $62.50 per week was intended by the parties as an amount payable for the support of the children as distinct from the amount payable for the support of the wife, and therefore not deductible by the taxpayer.

The agreement provides (R. 28) that upon the remarriage of the wife the "alimony" payments to her shall cease but, in lieu thereof, the taxpayer shall pay the sum of $31.25 per week for the support and maintenance of each child of their marriage until he reaches the age of twenty-one years. The same paragraph (4) (R. 29) provides that whether or not the wife remarries, as each child shall attain the age of twenty-one the "aforesaid alimony" shall be reduced by $31.25. It is further provided that the payments shall be reduced by $31.25 per week on the death of either child before he reaches the age of twenty-one; if both children die before reaching that age, the taxpayer was to pay the wife only $62.50 per week. (R. 29.)

The provisions discussed provide for two situations: (1) they cut off the wife's share of support ($62.50 a week) upon her remarriage, continuing

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[2] Even under local law the use of the word "alimony" in an agreement is not conclusive, and the agreement must be considered as a whole to determine the true nature of the payments. *Fox* v. *Fox,* 42 Cal. 2d 49, 53, 265 P. 2d 881, 883.

the payments for the children's support and maintenance ($62.50 a week); and (2) they cut off the portion allocated to the support of the children ($62.50) under circumstances where it becomes no longer necessary to support them. Although we submit that the provisions thus far discussed clearly justify the Tax Court's conclusion that $62.50 of the $125 weekly payments was allocated for the support of the children, if there could be any doubt of this the following provisions should settle the matter (R. 29):

> It is the *intention of the parties* that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week during her life and until her remarriage; * * *. [Italics supplied.]

Thus, at a time when the taxpayer would no longer be under a legal duty to support the children, payments to the wife would be reduced by $62.50. And, in paragraph 6(a) it is provided that (R. 23):

> The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage.

If the $125 weekly payments were, as the taxpayer contends (Br. 21-22, 27), for the support of the wife only, and the support of the children was left to her indulgence, then the provisions for fixed reduction in payments, as it becomes no longer necessary to support the children and when the taxpayer would no

longer be under a duty to support them, become completely meaningless. Moreover, it may be well to point out that at the time of the agreement in 1949 the children were sixteen and ten years of age, respectively (R. 42), and if the parties intended $125 weekly as wife support, then we have the anomalous situation of having the amount of the wife's support reduced by the total amount of $62.50 weekly eleven years hence (at the time the younger child reaches his majority) when it is reasonable to assume that the wife would have the most need for payments for her support. The payments are thus lowered without reference to the wife's needs, but geared solely by changed facts in the life of each child; and, it is settled law that a wife's right to support is not dependent upon the children's right to support from the husband. II Vernier, American Family Laws (1932), Section 105; *Bernard* v. *Bernard*, 79 Cal. App. 2d 353, 179 P. 2d 625. The only answer is that the taxpayer is incorrect in asserting that the agreement does not fix $62.50 a week as payable for the support of the children for, indeed, it does actually fix $62.50 a week as payable for their support.

Moreover, in the light of the provisions thus far discussed, that part of paragraph 4 of the agreement which gives the taxpayer the right to pay directly for the support of the children, in lieu of giving the wife the sum fixed for child support (R. 28), takes on significant meaning. This provision simply means that if the wife does not, as agreed, devote $62.50 of the weekly payments to the support of the children, then the taxpayer has the right to pay her

only the amount for her support, or $62.50 a week. The taxpayer's suggestion (Br. 21, 28), that the portion of the agreement now discussed gave the taxpayer the right to deduct all his actual costs of child support from the weekly payments to the wife, seems without foundation when we read the provision in context, as we must. Furthermore, it is inconceivable that the taxpayer could defeat all payments to the wife—that is, under his interpretation, if he underwent costs of $125 a week in supporting the children, the wife would be entitled to nothing. It is a settled proposition that a court will not read such forfeiture into a contract—especially so here where the parties, in the same provision, have fixed the "cost" of child support at $31.25 a week for each child, and fixed the support of the wife at $62.50 a week. *Ballard* v. *MacCallum*, 15 Cal. 2d 439, 444, 101 P. 2d 692, 695; *New Liverpool Salt Co.* v. *Western Salt Co.*, 151 Cal. 479, 485, 91 Pac. 152, 154; *Flagg* v. *Andrew Williams Stores, Inc.*, 127 Cal. App. 2d 165, 176, 273 P. 2d 294, 301; *Retsloff* v. *Smith*, 79 Cal. App. 443, 453, 249 Pac. 886, 889.

Indeed, the taxpayer concedes (Br. 30) that if we look to the instrument as a whole, "a permissible inference may be drawn * * * that the parties had in mind that the support of each child would amount to $31.25 per week." [3] But he argues (Br. 29, 37) that

[3] The taxpayer contends (Br. 30), however, that this is not the only inference to be drawn. But this contention must be examined in the light of the now familiar rule that an income tax deduction is a matter of legislative grace and that the taxpayer had the burden of clearly establishing his

the majority of the provisions discussed should be ignored because the wife had not remarried and the children had not died or reached twenty-one years of age. However, this is not the test; rather, the test is the meaning of the parties as ascertained from the whole instrument. Indeed, this is the test which the cases uniformly apply, including *Weil* v. *Commissioner*, 240 F. 2d 584, 588 (C.A. 2d), certiorari denied, May 13, 1957, much relied upon by the taxpayer throughout his brief.

The gist of the taxpayer's entire argument is that a husband's right to deduct periodic alimony payments under Section 23(u) of the 1939 Code is dependent upon his right, found in the decree of divorce or written agreement incident thereto, to control expenditures of the sum allocable to the support of his children.[4] It is apparently alleged (Br. 19-20, 22, 28, 30) that here the wife had full beneficial ownership of the entire periodic payments; hence the husband had no such control and is entitled to deduct the entire sum paid (Br. 22, 28).

However, when we read the statute and its legislative history, we find nothing that suggests such requirement. The Congressional reports merely talk in terms of a "sum payable for the support of minor children". H. Rep. No. 2333, 77th Cong., 2d Sess.,

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right to the claimed deduction, which he failed to do. *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590.

[4] In this case the agreement would satisfy such a test since the taxpayer retained the right to stop payments for child support and see to the children's support directly. See discussion, *infra*.

pp. 73-74 (1942-2 Cum. Bull. 372, 429); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 86 (1942-2 Cum. Bull. 504, 570). Moreover, one would search long and hard to discover a decree of divorce or separate maintenance which gives the husband control of the expenditure of amounts allocable to child support when the children live with the wife. A common provision is one directing the husband to pay a sum of money to the wife, and where the wife is given the custody and care of the children of the marriage, there is a designation for child support. Congress must be taken to have spoken with reference to the ordinary situation, and not to the exceptional situation to which no reference is made in its Committee reports, nor, indeed, in the statutory provisions themselves. Furthermore, in *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th), and *Budd* v. *Commissioner*, 7 T.C. 413, affirmed *per curiam*, 177 F. 2d 198 (C.A. 6th), and in every case cited *supra* in which amounts were held allocable to child support,[5] the wife was

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[5] Those cases cited by the taxpayer (Br. 32-37) reaching a different result are merely an illustration of the application of the principle we contend for. Each one is wholly distinguishable from the present case and lends conclusive support to the decision rendered by the Tax Court here. Thus, in *Moitoret* v. *Commissioner*, 7 T. C. 640, and *Seltzer* v. *Commissioner*, 22 T. C. 203, there was nowhere any indication as to how much money was intended for the support of the children. In his reference to the *Seltzer* case (Br. 32), the taxpayer directs this Court's attention to the fact that the agreement there provided that upon the remarriage of the wife the husband was to pay $90 per month rather than $120 per month to the wife. The taxpayer fails to point out, however, that the Tax Court there

given "control" of funds paid to her, at least to the extent that "control" was given here,[6] but that fact

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specifically pointed out (p. 208) that that provision was made applicable *only* if the parties were divorced in a jurisdiction other than New York; since they were divorced in New York it never became effective. In *Newcombe* v. *Commissioner*, decided February 19, 1951 (1951 P-H T. C. Memorandum Decisions, par. 51,045), affirmed on another point, 203 F. 2d 128 (C.A. 9th), the parties specifically agreed that the husband should pay $100 a month for the support of the children, *but not until* the wife remarried during the nine years subsequent to the agreement; therefore, the agreement affirmatively negatived any payment for child support, in the only provision fixing an amount for such support, until the occurrence of the stated contingency. In *Chapin* v. *Commissioner*, decided July 28, 1947 (1947 P-H T. C. Memorandum Decisions, par. 47, 224), the wife contended that the entire amount of the $6,000 yearly payments made to her was for the support of the children. Although the agreement fixed a sum for the support of the children upon her remarriage, the Tax Court held that until she remarried some part of it was for her support, and, there being no mention of any amounts payable for her support if she did not remarry, there was no basis for determining what part of it was so used, and it therefore taxed the whole amount to her.

[6] For example, in *Mandel* v. *Commissioner*, decided May 6, 1949 (1949 P-H T.C. Memorandum Decisions, par. 49,105), affirmed, 185 F. 2d 50 (C.A. 7th), the wife was given $18,000 a year, obligating herself to provide reasonable support for the children; in *Budd* v. *Commissioner*, 7 T. C. 413, 414, affirmed *per curiam*, 177 F. 2d 198 (C.A. 6th), the husband agreed to pay the wife $500 a month "for her support and/or alimony" and the support of the child; in *Neuwahl* v. *Commissioner*, decided July 21, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,206), the wife was given $500 a month, from which payments she agreed to support the minor children; and in *Morsman* v. *Commissioner*, 27 T. C. 520, the agreement provided that the husband would pay the wife certain sums so that she could provide for herself and support the children.

was not considered sufficient to warrant a holding that the entire amount was taxable to the wife and deductible by the husband, in the face of other provisions in which the parties, as here, provided for an allocation of a fixed sum for the support of their children.[7]

The taxpayer places much emphasis upon a dictum in *Weil* v. *Commissioner*, 240 F. 2d 584 (C.A. 2d), certiorari denied May 13, 1957, to the effect that a husband can deduct all periodic payments where there is an "intention to make payments to the wife and have her support the children". But this statement is taken out of context and so taken completely ignores the crucial inquiry under the statute, *viz.*, whether the terms of the decree or agreement at issue, when read as a whole, fix a sum allocable to the support of minor children. This is all the statute requires, and the fact that it is the wife who is to so apply the payments is completely beside the point. This is so, in addition to the reasons given *supra*, because that circumstance does not answer the statutory test of whether $62.50 of the $125 weekly payments was here fixed in the agreement as payable for child support.[8]

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[7] It is essential to note that the statute uses the word "payable" for the support of minor children. The word "payable" is defined as "Capable of being paid; suitable to be paid; * * *; justly due; legally enforceable." Black's Law Dictionary (Fourth ed.), p. 1285.

[8] Indeed, Section 22(k) of the 1939 Code provides that when there is a sum fixed as allocable for child support in a decree or written instrument, then where a periodic pay-

Actually, the *Weil* case is completely distinguishable on its facts from the case at bar. The agreement in that case did not provide for a reduction in fixed amounts of periodic payments in the case of the death or majority of the children. Indeed, the agreement there stated, in Article 13(j), that (p. 588):

> There shall be no revision in the payments herein provided for to be made to the Wife by reason of the death or majority of the children or either of them or by reason of the fact that they then no longer reside with the Wife * * *.

Except in the case of the wife's remarriage, the agreement in that case nowhere fixed a sum for reduction in payments in situations where the wife ceased to support the children. The Second Circuit ruled (p. 588) that a sum cannot be found as allocable to the support of children "if the terms of the instrument contemplate a continuance of the payments to the wife after she has ceased to support the children"—that in such case the wife has complete independent beneficial ownership in the whole of the periodic payment. That court was convinced (p. 588) that Article 13(j) of the *Weil* agreement overcame the provision found in the remarriage clause and conclusively indicated that the parties did not

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ment is less than the periodic payment required to be made, the amount actually paid is considered paid for the support of the children to the extent of the sum fixed as so payable in the decree or written instrument.

intend any portion of the payments for child support.[9]

In the agreement at bar, however, we find all that the Second Circuit said it could not find in the *Weil* agreement. Thus, we have an instrument which contemplates a *discontinuance* of a fixed amount of the periodic payments to the wife after she ceases to support the children, or where the husband is no longer obligated to support the children. Therefore, in accordance with the Second Circuit's view in the *Weil* case, the wife here did not have the independent beneficial interest that Mrs. Weil had. Additionally, the wife here is deprived of any independent interest in $62.50 of the $125 weekly payments, which, if she failed to devote to the support of the children, the taxpayer could deduct from the weekly payments and see directly to the children's support. Clearly, if the wife did not, for any period, support the children, she could not compel the taxpayer to make the full $125 weekly payments to her for that period. See *Mandel* v. *Commissioner*, 229 F. 2d 382 (C.A. 7th).

The taxpayer's arguments concede the fact that

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[9] From a reading of the principal holding in the *Weil* case, and from that opinion's agreement with the principle applied in the *Mandel* and *Budd* cases, *supra* (in both the *Mandel* (185 F.2d 50, 51) and *Budd* (7 T.C. 413, 415) cases there were specific provisions for reduction of the payments in the event of the death of a child), it is clear that the rule announced by the Second Circuit was that if, upon reading the agreement as a whole, there is a sum fixed as allocable to child support, then that sum is not deductible by the husband, but if a sum is not so fixed, then the husband can deduct all sums.

under the *Mandel* and *Budd* line of cases [10] the Tax Court here drew a permissible inference, but ask this Court to declare those cases in error. (Br. 22-26, 30.) Aside from the arguments we have thus far made, the taxpayer has completely ignored the fact that Congress has recognized those cases as stating the correct rule. The *Mandel* and *Budd* cases were decided in 1950 and 1947, respectively, and state the rule which has been applied repeatedly by the courts under Sections 22(k) and 23(u) of the 1939 Code since the enactment of those provisions in 1942. These subsections of Sections 22 and 23, respectively, were reenacted by Congress as Sections 71 and 215, respectively, of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. II, Secs. 71 and 215, respectively), and, in connection with the issue here presented, were stated by Congress to be substantially the same as existing law (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A20-A21, A62 (3 U.S.Cong. & Adm. News (1954) 4017, 4157, 4198); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 170-171, 221 (3 U.S. Cong. & Adm. News (1954) 4621, 4805, 4858)). Under the well-settled principle of statutory construction that reenactment of a statute without change or indicating disapproval of the uniform judicial construction which it has theretofore received is implied legislative approval of the prior construction,[11] Con-

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[10] *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th); *Budd* v. *Commissioner*, 177 F. 2d 198 (C.A. 6th).

[11] It is settled law that subsequent legislation may be considered to aid in the interpretation of prior legislation upon the same subject. *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277.

gress has agreed that the *Mandel* and *Budd* line of cases have properly applied the statutory provisions in question. *Missouri* v. *Ross*, 299 U. S. 72, 75; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479. See *Dist. of Columbia* v. *Murphy*, 314 U. S. 441, 449; *Manhattan Prop.* v. *Irving Tr. Co.*, 291 U. S. 320, 335-336.

CONCLUSION

The decision of the Tax Court is correct and should therefore be affirmed.[12]

Respectfully submitted,

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AUGUST, 1957.

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[12] If this Court, however, should sustain the contention of the taxpayer, then the basis for the Tax Court's allowance to him of dependency credits for the children would disappear, and the case should be remanded to the Tax Court to make the proper adjustments.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 435308 185

No. 15387

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Jo Eisinger and Lorain B. Eisinger,

Appellants,

vs.

Commissioner of Internal Revenue,

Appellee.

APPELLANTS' REPLY BRIEF.

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No. 15387

IN THE

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COMMISSIONER OF INTERNAL REVENUE,

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APPELLANTS' REPLY BRIEF.

I.

APPELLEE'S BRIEF DOES NOT SQUARELY OR ADEQUATELY MEET AND OVERCOME APPELLANTS' ARGUMENTS.

A. Briefly Summarized, Appellants Made the Following Arguments in Their Opening Brief:

1. The Tax Court Was Wrong in Holding That Part of the Payments Made Were "Payable for the Support of Minor Children" (p. 14).

Here Appellants fully discussed the case of *Weil v. Commissioner,* 240 F. 2d 584 (2d Cir. 1957) and pointed out that the *Weil* case clearly held that to be "payable for the support of minor children" within the meaning of the Section 22(k) of the 1939 Code, the use of the funds paid to the wife "must be restricted to that purpose, and the wife must have no independent beneficial interest therein." 240 F. 2d 588.[1]

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[1]It was also pointed out that nowhere in the record is there a finding or any facts which would support a finding that the Eisinger agreement, or the decree incorporating said agreement, required the wife to use any specific sum of money only for the support of minor children.

2. **All of the Decisions Cited and Relied Upon by the Tax Court Were Based on a Misconstruction of the Words "Payable for the Support of Minor Children" (p. 22).**

Here Appellants fully discussed the cases cited and relied upon by the Tax Court [Tr. Rec. 41-45] and pointed out that apparently, in all of said cases, the Courts without expressly considering the problem, interpreted the words "payable for the support of minor children" as meaning something entirely different from the meaning ascribed to the words by the *Weil* case. In addition, Appellants pointed out that in not one of the cases cited by the Tax Court did the instrument or the decree of divorce require the wife to use any specific sum of money only for the support of minor children. Therefore, under the reasoning of the *Weil* case, it was concluded that all of the cases cited by the Tax Court should have been decided differently.

3. **Properly Construed, the Property Settlement Agreement and the Divorce Decree Embodying It Provide Only for Alimony Payments to the Wife (p. 27).**

Here Appellants discussed the terms of the agreement between Appellant Jo Eisinger and his former wife Wilhelmina, and pointed out that the provisions of the agreement itself lead inevitably to the conclusion that the agreement and the decree embodying it do not provide for payments for the support of minor children within the meaning of Section 22(k) of the 1939 Code. This conclusion is reached without reference to the meaning of the words "payable for the support of minor children" as set forth in *Weil v. Commissioner.*

4. **The Case Law Favoring Appellants' Contention That the Tax Court Erred in Finding Part of the Payments Were for the Support of Minor Children (p. 32).**

Here Appellants discussed six cases all of which on principle are opposed to the decision rendered by the Tax Court.

B. In Answer to Appellants' Opening Brief, Appellee Has Presented the Following Arguments:

1. **"The Clear Purpose of Sections 23(u) and 22(k) Was to Relieve the Husband of Tax Only on That Portion of a Periodic Payment Which Was Not Designated or Identified in the Divorce Decree or Written Instrument Incident Thereto as Destined for Support of His Minor Children. . . . Therefore, Where, From the Divorce Decree or Written Instrument Incident Thereto, an Amount Can Be Ascertained as Allocable to the Support of Children, the Wife Is Not Required to Include in Her Gross Income Those Amounts Not Received by Her for Her Support" (p. 10).**

Nowhere in Appellee's brief is there anything to support this statement as to the "clear purpose of Section 23(u) and 22(k)." On the contrary, the clear purpose of Sections 23(u) and 22(k) was to relieve the husband of paying taxes upon sums of money paid by him to his former wife over which the former wife was given complete control. That this was the legislative purpose is borne out by the following:

(a) Section 22(k) says "payable for the support of minor children" and not "allocable" or "identifiable as

payable for" or "destined for" as suggested by the Commissioner in his brief.[2]

(b) *In Weil v. Commissioner,* 240 F. 2d 584 (2nd Cir., 1957), the Court stated:

> "We hold that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein." (240 F. 2d 588.)

Thus, the fact that there may be indications in the agreement that some part of the payment was thought of by the parties as necessary to support the children is not sufficient to hold that that part is "payable for the support of minor children." We defy Appellee to point to any provision of the instant agreement restricting the wife to use any part of the payments made to her under the agreement *only* for the support of the minor children. On the other hand, the instrument read as a whole conclusively

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[2]It is most important here to note that Section 22(k) does not use the words "designated" or "identified as destined" for the support of minor children as the Commissioner indicates. The statute merely states "payable for the support of minor children."

It should be emphasized that throughout the Commissioner's brief, the attempt is made to create the impression that Section 22(k) reads that if any part of the money payable to the wife is *identifiable,* or *destined* or *allocable* for the support of minor children, it must be included in the husband's taxable income (e.g., pp. 10, 11, 12, 14, 20). This completely ignores and obscures the fact that Section 22(k) only uses the words "payable for the support of minor children." It nowhere uses the terms "identifiable" or "allocable" or "destined for." Therefore, Appellee's Brief should be read carefully with a view to recognizing, and thereupon deleting these words and substituting therefor the words "payable for the support of minor children." The meaning of the Statute is too important an issue to be obscured by misinterpretation caused by misstatement of its clear wording.

demonstrates that the parties intended that the wife should not be restricted in her use of any part of the payments. The husband bargained for the wife to support the children, just as did the husband in the agreement interpreted by *Weil v. Commissioner, supra.*

(c) The regulations promulgated by the Commissioner himself lend support to the interpretation given to Sections 22(k) and 23(u) by the Court in *Weil v. Commissioner.* Regulation 111, Section 29.22(k)-1.(d), 1939 Code, provides that "[s]ection 22(k), does not apply to that part of any periodic payment, which by the terms of the decree or the written instrument under Section 22(k), is *specifically designated as a sum payable for the support of minor children of the husband . . .*" (Italics added.) Note that *the Regulation requires specific designation* by the agreement of a sum payable for the support of minor children, and not as the Commissioner contends, just inferences drawn from provisions in the agreement which are obviously not intended to provide for child support. Nowhere in the instant agreement is there any *specific designation* of a sum which is payable for the support of minor children. Therefore, the regulations require a judgment contrary to that rendered by the Tax Court.

(d) The Court's attention is directed to the composition of Section 22(k) of the 1939 Internal Revenue Code (Appellants' Brief, pp. 8-9). The Statute provides that under certain conditions, periodic payments received by the wife shall be included in her gross income. It then continues "[t]his sub-section shall not apply to that part of any periodic payment . . . which is payable for the support of minor children of such husband." In effect, the latter sentence excepts certain portions of the payments from the operation of the Statute. It is a gener-

ally accepted rule of statutory construction that exceptions to a statute are narrowly construed. (*United States v. Scharton, Mass.,* 285 U. S. 518, 521; *Woods v. Oak Park Chateau Corp.,* 179 F. 2d 611, 614 (7th Cir., 1950); *National City v. Fritz,* 33 Cal. 2d 635, 636, 204 P. 2d 7, 9 (1949); 82 C. J. S., Statutes, Sec. 382.) If the words "payable for the support of minor children" are subject to more than one interpretation, narrow construction requires they be given the interpretation which would except from the requirement of inclusion in the wife's gross income the smallest amount of money possible.

In this case, several interpretations of the words "payable for the support of minor children" are possible. The words could be interpreted to mean any sums of money

(i) actually expended by the wife for support of the minor children, or

(ii) which some provision of the agreement may be taken as indicating that the parties may have thought of said sum as desirable or necessary for the support of the minor children, or

(iii) which the instrument or decree expressly designates as payable for the support of minor children, or

(iv) which the agreement or decree obligates the wife to use only for the support of minor children.

The first mentioned interpretation is of course the broadest construction of the words, and the fourth is the narrowest. It is submitted that under both the third and fourth interpretations and the facts of the instant case, the Tax Court should have concluded that no sum was "payable for the support of minor children." Therefore, the conclusion is inescapable that the Tax Court erred, and on this basis alone its decision should be reversed.

2. **Under the Principle of Construction That We Must Look to the Whole Instrument, "It Is Made Clear That . . . $62.50 Per Week Was Intended by the Parties as an Amount Payable for the Support of the Children" (p. 13).**

Here the Commissioner quotes some of the terms of the agreement and states that the "provisions discussed provide for two situations: (1) they cut off the wife's share of support ($62.50 a week) upon her remarriage, continuing the payments for the children's support and maintenance ($62.50 a week); and (2) they cut off the portion allocated to the support of the children ($62.50) under circumstances where it becomes no longer necessary to support them" (p. 13). It is submitted that Appellee's summary merely begs the question. Note his statement that the provisions "cut off the wife's share of support . . . upon her remarriage, continuing the payments for the children's support and maintenance . . . ." In stating that the provisions cut off the wife's "share of support" the Commissioner thereby assumes the very question that this case seeks to determine, *viz.*, whether only a "share" of each payment was for support of the wife and therefore, whether a "share" thereof was for the support of the minor children. Appellants' position is that the entire payments made were for the support of the wife. The provisions "cut off the portion allocated for the support of the children" states Appellee, thereby again assuming the very issue to be determined—whether there was in fact a portion allocable for the support of the children. It is strenuously urged that these arguments presented by Appellee are of no aid in determining the question here presented.

3. **The Provision That "If the Wife Shall Fail to Support Either or Both of Said Children, the Husband May Pay the Cost Thereof and Deduct the Same From Said Weekly Alimony" [Tr. Rec. p. 28] Merely Means That, if the Wife Fails to Support the Children, the Husband "Has the Right to Pay Her Only the Amount for Her Support, or $62.50 a Week" (pp. 15-16).**

Appellants confess that they have never seen a more tortured and ridiculous construction of any provision than the construction here adopted by the Commissioner. He would have this Court construe the phrase "the husband may pay the cost thereof" to mean something totally foreign to the plain meaning of the words used. Appellee then proceeds to state "[i]t is a settled proposition that a court will not read such forfeiture into a contract—especially so here where the parties, in the same provision, have fixed the 'cost' of child support at $31.25 a week for each child, and fixed the support of the wife at $62.50 a week." The Commissioner believes that the terms of the agreement which upon the wife's breach, give the husband the right to pay the actual cost of child support and deduct the same from "weekly alimony" is a forfeiture provision. However, this is not what courts refer to when they speak of not reading forfeitures into contracts.[3] Obviously, this is just a provision designed to protect the husband in the event the wife breaches her

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[3]In all cases cited by Appellee (p. 16), contracts existed which could be construed in more than one way. One possible construction would have resulted in the forfeiture of valuable property rights by one of the parties. Consequently, the Court adopted another, more reasonable construction. The provision in the Eisinger agreement admits of only one reasonable construction. Moreover, at any time the wife may halt what the Commissioner calls a "forfeiture" by resuming her support of the children, in accordance with her agreement.

agreement to support the children. Does Appellee contend that the husband cannot provide for deducting his damages in the event of such a breach? Indeed, the provision is superfluous since the husband could set off his damages even in the absence of express authority to do so. Such ridiculous reasoning by the Commissioner merely serves to emphasize the weakness and unsupportability of his position.

4. **"The Gist of the Taxpayer's Entire Argument Is That a Husband's Right to Deduct Periodic Alimony Payments Under Section 23(u) of the 1939 Code Is Dependent Upon His Right, Found in the Decree of Divorce or Written Agreement Incident Thereto, to Control Expenditures of the Sum Allocable to the Support of His Children" (p. 17).**[4]

This is a gross and unwarranted misstatement and misinterpretation of Appellants' Brief and of the clear and conclusive holding of the Second Circuit in *Weil v. Commissioner*. Nowhere does Appellants' brief indicate that in order for the husband to deduct payments made to the wife, he must have no control over expenditures of the sum paid, and conversely, that if he has control over the expenditures of the sum paid, he cannot deduct such sum from his taxable income. What Appellants' brief asserts and the *Weil* case affirms is that the wife's obligation to include sums paid to her in her taxable income under

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[4]If the "gist of the taxpayer's entire argument" is as stated by Appellee, query as to his statement at page 12 of his Brief "[p]aragraph 4 of the agreement begins . . . 'Husband agrees to pay to the Wife, by way of alimony, the sum of . . . ($125.00) per week. . . .' The taxpayer appears to contend . . . that it is this provision that is decisive in answering the question here involved."

Section 22(k) depends on whether she has complete control over the expenditure of the sums paid and therefore, a beneficial interest therein. Where she does, she must include the sums in her taxable income, and conversely, the husband may exclude said sums from his taxable income. On the other hand, where the sum paid to the wife, or any part thereof, is to be used *only* for support of minor children, such sum may not be included in the wife's, but must be included in the husband's taxable income. Therefore, where payments are made to the wife both for her own support and for the support and maintenance of the children, it is held that she must include the entire sum paid in her income, and the husband may exclude the entire sum from his income. (*E.g., Dora H. Moitoret v. Commisisoner, 7* T. C. 640 (1946); see Appellants' Brief, p. 32.)

Appellee forgets, or deliberately overlooks the fact that, where a sum is designated as payable only for the support of minor children by agreement or decree, the wife has no right to expend any part of said sum for her own support and maintenance, and her attempt to do so would be a violation of the duty and obligation imposed on her by the agreement or decree when she is given custody of the minor children. The only thing that she is permitted to do with such sums is to apply them to the children's support. If she applies any part of said sums for any purpose other than support of the children, she is violating a trust, and at least in the case of a court order, is subject to the power of the Court to enforce and protect its decrees.

5. **The Statement in Weil v. Commissioner ". . . to the Effect That a Husband Can Deduct All Periodic Payments Where There Is an 'Intention to Make Payments to the Wife and Have Her Support the Children'" Is "Dictum," Is "Taken Out of Context and so Taken Completely Ignores the Crucial Inquiry Under the Statute, Viz., Whether the Terms of the Decree or Agreement at Issue, When Read as a Whole, Fix a Sum Allocable to the Support of Minor Children" (p. 20).**[5]

Appellee completely misinterprets the true meaning of the decision in *Weil v. Commissioner*. That case was not, as the Commissioner would have it, a conclusion based solely upon the facts of the case that a sum of money was not "payable for the support of minor children." On the contrary, the *Weil* case clearly held that where the agreement or decree of divorce does not require the wife to use a specific sum of money *only* for the support of the minor children, the husband is entitled to deduct all of the money paid to the wife (providing, of course, the other requirements of Section 22(k) are met). Granted the Court in the *Weil* case examined the terms of the agreement and that they differ from the terms of the agreement here under consideration. However, the Court there clearly indicated that it examined the facts in order to determine whether the agreement required the wife to

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[5]The portion of the *Weil* case relied on by Appellants is not "dictum" as suggested by Appellee (p. 20). It is, instead, a clear and direct holding as to the meaning of the words "payable for the support of minor children." The Court's attention is invited to the following quotation from the *Weil* decision: "*We hold* that sums are 'payable for the support of minor children' when they are to be used for that purpose only." (Emphasis added; 240 F. 2d 588.) It seems to Appellants that the Second Circuit is in a better position than Appellee to judge whether its own words are dictum or holding.

use any specific amount of money only for the support of minor children. There is no basis for believing that it examined the *Weil* agreement with the intent of determining whether it contained any specific provisions indicating that the parties had in mind some certain amount of money as necessary for the support of the minor children. Since as in the *Weil* case, the agreement here under consideration does not require the wife to use any specific sum only for support of the minor children, this appeal should be decided in favor of Appellants.

There is no salvation for the Commissioner in any part of the *Weil* opinion. For example, he seeks solace in the fact that even the *Weil* case asserts the principle that the whole instrument must be examined to ascertain the intent of the parties (p. 17). It is agreed that this principle must be applied in the instant case. However, Appellants challenge the Commissioner to show any provision in the Eisinger agreement or decree which requires the wife to use any specific sum for the support of the minor children. The Commissioner apparently believes that his position should be sustained if he can point to one clause or provision in the agreement or decree which indicates that one or both of the parties might have had an idea or believed that it would be necessary for the wife to use a certain sum to support the minor children. This we wish to emphasize, is unimportant under the *Weil* case. *It is only where the wife must use some specific sum for support of the minor children that she does not have to include said sum in her taxable income.*

Appellants have made no attempt to lead the Court to believe that the agreement in the instant case does not differ from that in the *Weil* case. However, it is con-

tended that if in the *Weil* case, the Second Circuit had been faced with an agreement identical to the one here under consideration, it would nevertheless have held against the Commissioner on the basis of its conclusion as to the meaning of the words "payable for the support of minor children."

6. Appellants Have "Completely Ignored the Fact That Congress Has Recognized" That the Mandel and Budd Cases State the Correct Rule (p. 23).

Appellee states that "under the well-settled principle of statutory construction . . . reenactment of a statute without change or indicating disapproval of the uniform judicial construction which it has theretofore received is implied legislative approval of the prior construction . . ." (p. 23).

This argument is both misleading and unconvincing.[6] To begin with, Appellee does not make clear what rule stated by the *Budd* and *Mandel* cases has been recognized as correct by Congress. These two cases both hold that on the basis of the facts, part of the sums paid were "payable for the support of minor children." The only rule

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[6]Balanced against this "rule of statutory construction" relied on by the Commissioner, is the argument that since the Supreme Court of the United States has refused Certiorari in the case of *Weil v. Commissioner,* ..... U. S. ....., 77 S. Ct. 864, 1 L. Ed. 2d 909 (May 13, 1957), it thereby approved of the decision. (See, *e.g., Pender v. Commissioner of Internal Revenue,* 110 F. 2d 477, 479 (4th Cir., 1940), *cert. den.,* 310 U. S. 650; *Tasty Baking Co. v. United States,* 38 F. Supp. 844, 848 (Ct. Cls., 1941), *cert. den.,* 314 U. S. 654.) Therefore, it could be argued that the rule of *Weil v. Commissioner* has been approved by the Supreme Court of the United States. However, Appellants believe that such arguments as these should not obscure the main issue and prevent this Court from expressing its opinion as to the true meaning of Sections 22(k) and 23(u).

they announce is the rule that the agreement must be read in its entirety to determine the intent of the parties. However, Appellants fail to see where these cases announced any rule of construction with respect to the meaning of the words "payable for the support of minor children." Therefore, since the *Budd* and *Mandel* cases were decisions, based on their facts alone, that sums were payable for the support of minor children, Appellants fail to see where by reenactment of the Code provisions, Congress could have approved any rule which would serve to bolster Appellee's position.

In general, the cases cited by Appellee (p. 24) stand for the proposition that when Congress reenacts a statute after it has been uniformly construed by many cases over a relatively long period of time, the reenactment is *persuasive* evidence that Congress intended to approve the construction adopted by the cases, and this is especially true where the construction has been by the Supreme Court or the Courts of Appeal. In the instant case however, there has not been a uniform construction of the statute by cases decided over a long period of time. Moreover, of the few cases that have reached the Courts of Appeal, the *Weil* case is the only one which squarely meets the issue of the meaning of the statute in question, and the construction adopted therein is opposed to the construction contended for by the Appellee.

In addition, as stated by the Supreme Court in *Jones v. Liberty Glass Co.,* 332 U. S. 524, 533-534, "the contention is advanced that the legislative acquiescence in the interpretation must be assumed" because various lower federal courts have reached a uniform result. "But the doctrine of legislative acquiescence is at best only an

auxiliary tool for use in interpreting ambiguous statutory provisions." Moreover, particularly where there is not the "slightest affirmative indication that Congress" ever had the prior decisions before it, "[r]eenactment . . . is an unreliable indicium at best." *Commissioner v. Glenshaw Glass Company,* 348 U. S. 426, 431 (1955).

C. The Following Arguments Were Either Unanswered or Inadequately Answered by Appellee's Brief:

1. Nowhere Does Appellee Squarely Meet the Issue Raised by Appellants' Reliance on Weil v. Commissioner.

As pointed out *supra,* Appellee answers the holding of the *Weil* case by calling it "dictum" (p. 20) and by asserting that "when we read the Statute and its legislative history, we find nothing that suggests such requirement" (p. 17). However, nowhere does Appellee cite or refer to any case which expressly applies or sets forth a definition of "payable for the support of minor children" which is at variance with the definition adopted in *Weil v. Commissioner.*

2. Nowhere Does Appellee Adequately Discuss or Answer Appellants' Contention That "Properly Construed, the Property Settlement Agreement and the Divorce Decree Embodying It Provide Only for Alimony Payments to the Wife" (pp. 27-31).

In their opening brief, Appellants made the point that the property settlement agreement should be construed according to the intent of the parties thereto (p. 27). Appellants then discussed the relevant provisions of the agreement in question and enumerated nine points bearing on the intent of the parties as evidenced by the written agree-

ment (pp. 28-29). Of these, Appellants pointed out that seven conclusively evidence the parties' intent to provide payments for support of the wife only as distinct from support of the children; one evidences the intent of the parties to pay child support *but* only in the event of the wife's remarriage (which event did not occur prior to the payments made in 1949 and 1950, the years in question); and only one could be legitimately used by the Commissioner to support the Tax Court's decision—and this point is weak and inconclusive at best (see Appellants' Brief, pp. 30-31).

Although Appellee asserts that "[t]he test is the meaning of the parties as ascertained from the whole instrument" (p. 17), he ignores Appellants' argument that the provisions of the agreement should be consulted to determine the intent of the parties thereto. A cursory discussion of some of the above points appears in Appellee's brief (pp. 12-16, 22). Suffice it here to mention that Appellee chose to ignore the following points:

(a) At all times, payments to the wife are referred to as alimony.

(b) In consideration of the agreement of the husband to pay the wife $125.00 per week, the wife agrees to support the children.

(c) If the husband is called upon to pay any claim asserted against him by reason of a debt incurred by the wife, he may stop paying the alimony provided for until the weekly alimony aggregates the amount of the claim.

(d) "The parties have incorporated in this agreement their entire understanding. No oral statements nor prior written matter extrinsic to this agreement shall be in force or effect."

(e) Nowhere does the agreement provide for any specific sum to be applied by the wife to the support of the children.

Appellee does discuss the provision that "if the Wife fails to support the children, the Husband may pay the cost thereof and deduct same from the weekly alimony" (pp. 15-16). However, as pointed out *supra,* page 11, Appellee's explanation thereof is entirely out of touch with reality. The Commissioner emphasizes the provision that upon remarriage of the wife, the "alimony" payments to her cease "but in lieu thereof" the husband promises to pay for the support and maintenance of the children (pp. 13-14). However, he completely ignores the fact that in no other place does the agreement provide that payments made to the wife are for the support and maintenance of the children. In addition, he fails to point up that *this provision is inoperative unless the wife remarries.* Therefore, prior to the wife's remarriage, it should not be relied upon as evidence that some part of the payment was intended for child support. (See discussion, Appellants' Brief, pp. 29-30.) Of primary importance, however, is the fact that the Commissioner himself recognizes that provisions which are inoperative until the occurrence of some future event should not be used as evidence that the parties intended some part of the payments as child support before the event occurs. (See discussion of *Seltzer* and *Newcombe* cases, in Footnote 5, Appellee's Brief, pp. 18-19.)

Thus, as contended by Appellants (pp. 30-31), the only provision upon which Appellee can with some reason rely is that alimony payments are to be reduced upon certain future events, that is, the death or attainment of age 21

by the children. Appellants reassert that this provision alone is insufficient to support a finding that the agreement provides for payments for child support. Appellants agree with Appellee that *"the test is the meaning of the parties as ascertained from the whole instrument"* (p. 17). (Emphasis added.) But this just supports Appellants' position, because, *when the agreement is read as a whole, the conclusion is inescapable that the parties did not intend to provide for child support.*

3. Nowhere Does Appellee Adequately Counter the Case Law Cited as Favoring Appellants' Position.

In their opening brief, Appellants cited six cases in support of the proposition that the agreement in question did not provide for payments for the support of minor children (pp. 32-38). Appellee's entire discussion of Appellants' argument is contained in a footnote (designated number 5) appearing in Appellee's Brief (pp. 18-19). Here an attempt is made to distinguish the facts of the cases cited by Appellants from the facts of the case at bar.[7]

However, it is significant to note that nowhere does Appellee attempt to take issue with the propositions these cases stand for as set forth in Appellants' brief (pp. 37-38). Appellants submit that Appellee failed to contest the conclusions drawn from these cases by Appellants

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[7]In his discussion of the *Seltzer* case, Appellee states that the "taxpayer fails to point out, however, that the Tax Court there specifically pointed out (P. 208) that that provision was made applicable *only* if the parties were divorced in a jurisdiction other than New York; since they were divorced in New York, it never became effective." That Appellants failed to point out this fact is patently untrue. (See discussion of *Seltzer* case, Appellants' Brief pp. 32-33).

simply because there is no basis upon which he could reasonably contest them. Therefore, Appellants reaffirm the proposition that on the basis of these cases alone, the Tax Court should have held for Appellants.

II.

APPELLEE'S BRIEF CONTAINS A NUMBER OF ERRONEOUS, ILLOGICAL AND MISLEADING STATEMENTS.

Appellants have noted a number of erroneous, illogical and misleading statements contained in Appellee's Brief. Rather than greatly extend their Reply Brief in an attempt to dissect each statement falling into this category, Appellants have set forth each statement and a brief comment thereon in Appendix "A".

CONCLUSION.

The decision of the Tax Court should be reversed.

Respectfully submitted,

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APPENDIX "A."

Comparative Table Analyzing Erroneous, Illogical or Misleading Statements Contained in Appellee's Brief.

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
8	". . . The agreement reduces the periodic payments by a *fixed* sum . . . when the wife remarries, continuing the payments for the support of the children . . . thereafter. . . ."	Should read ". . . the agreement discontinues the periodic payments of alimony when and if the wife remarries, *and substitutes therefor* payments for support of the children." [Tr. Rec. p. 28.]
10	"The clear purpose of Sections 23(u) and 22(k) was to relieve the husband of tax only on that portion . . . not designated or identified in the . . . decree or . . . instrument . . . as destined for support of his minor children. . . . [W]here . . . an amount can be ascertained as allocable to the support of children, the wife is not required to include . . . those amounts. . . ."	Section 22(k) does not use the terms "designated" or "identified" or "destined for" or "allocable to." It merely says "payable for the support of minor children."

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
12	"The taxpayer appears to contend . . . that it is this provision that is decisive in answering the question here involved."	Nowhere in Appellants' Brief is there any justification for Appellee asserting that Appellants rely on one provision alone as decisive of the question presented.
12-13	"But in . . . paragraph (4) the parties give their own meaning to the term 'alimony.'"	Nowhere does Appellee set forth a convincing argument that the parties intended something different from the ordinary when they used the term "alimony."
14	"[T]he provisions . . . discussed . . . justify the Tax Court's conclusion that $62.50 of the $125 weekly payments was allocated for the support of the children. . . ."	The statute (Sec. 22(k)) does not use the term "allocated" for the support of minor children. It says "payable for."
14	"If the $125 weekly payments were, as the taxpayer contends . . . for the support of the wife only, and the support of the children was left to her indulgence, then . . ."	Nowhere does taxpayer contend or imply that support of the children was left to the wife's indulgence. The agreement and decree obligated the wife to support the children. What it did not do, however, is obligate her to use any specific sum of money for their support.

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
15	". . . [I]f the parties intended $125 weekly as wife support, then we have the anomalous situation of having the amount of the wife's support reduced by . . . $62.50 weekly eleven years hence (at the time the younger child reaches his majority) when it is reasonable to assume that the wife would have the most need for payments for her support."	At the time of the agreement the wife obligated herself to support two children. "Eleven years hence" she will only have herself to support. How then is it "reasonable to assume" that at that time "the wife would have the most need for payments for her support"?
15	". . . [P]aragraph 4 of the agreement . . . gives the taxpayer the right to pay directly for the support of the children, in lieu of giving the wife the sum fixed for child support. . . ."	Here again the Commissioner indulges in the practice of arguing from the premise that a sum is "fixed for child support" in the agreement. This, of course, is the very essence of the controversy.
16	"Indeed, the taxpayer concedes (Br. 30) that if we look to the instrument as a whole, 'a permissible inference may be drawn . . . that the parties had in mind that the support of each child would amount to $31.25 per week.' But he argues . . . that the majority of the provisions discussed	This is a flagrant misrepresentation of Appellants' words, which actually are, "Appellants agree that a permissible inference may be drawn from *this provision* . . ." (emphasis added; Appellants' Brief, p. 30). Moreover, Appellants never argue "that the majority of the provisions . . . should

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
	should be ignored because the wife had not remarried and the children had not died or reached twenty-one. . . ."	be ignored." On the contrary, Appellants emphasize that all provisions of the agreement should be considered—not just one or two (Appellants' Brief, pp. 27-31).
20	"But this statement . . . completely ignores the crucial inquiry under the statute, *viz.*, whether the terms of the decree or agreement at issue, when read as a whole, fix a sum allocable to the support of minor children."	Again, Appellants wish to point out that Section 22(k) reads "payable for" and not "allocable to the support of minor children."
22	"Thus we have an instrument which contemplates a *discontinuance* of a fixed amount of the periodic payments to the wife after she ceases . . . or where the husband is no longer obligated to support the children. Therefore, in accordance with the Second Circuit's view in the *Weil* case, the wife here did not have the independent beneficial interest that Mrs. Weil had."	Apparently, Appellee either misunderstands or misconstrues the requirement of "independent beneficial interest" as set forth in *Weil v. Commissioner*. Reference to that case reveals that the Court merely meant that where the wife was obligated to apply some part of the payment received to the support of the children, she could not use that part for her own benefit, and therefore she had "no independent beneficial interest therein." Since, as in the

Page(s) in Appellee's Brief	Appellee's Statement	Appellants' Comments
		Weil case, the instant agreement or decree do not require the wife to apply any specific sum for child support, Mrs. Eisinger had the same "independent beneficial interest" in the payments made to her as did Mrs. Weil.
22	"From a reading of . . . the *Weil* case . . . it is clear that the rule announced . . . was that if, upon reading the agreement as a whole, there is a sum fixed as allocable to child support, then that sum is not deductible by the husband, but if a sum is not so fixed, then the husband can deduct all sums." (Footnote 9.)	No clearer misstatement of the rule of the *Weil* case could be made. It nowhere uses the term "allocable." It is beyond Appellants' understanding how the Commissioner has the temerity to urge this construction in view of the Court's statement, "we hold that sums are payable for the support of minor children when they are to be used for that purpose only." (240 F. 2d 588.)
22-23	"The taxpayer's arguments concede the fact that under the *Mandel* and *Budd* line of cases the Tax Court here drew a permissible inference, but ask this Court to declare those cases in error."	This is not true. Appellants nowhere conceded that under these cases the Tax Court drew a permissible inference that the payments made were for support of minor children.

APPENDIX "B."

Errata

Appellants' wish to call the Court's attention to the following errors appearing in Appellants' Opening Brief.

1. On page 4, the first line of the second full paragraph reads "On their 1949 and 1952 Income Tax Returns. . . ."

This should be corrected to read as follows:

"On their 1949 and 1950 Income Tax Returns. . . ."

2. On page 38, the last line of the Conclusion reads ". . . $6,729.00 during 1950, respectively."

This should be corrected to read as follows:

". . . $6,677.00 during 1950, respectively."

No. 15388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANASTASIO LAWRENCE AMAYA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division, the Honorable Thurmond Clarke, Presiding.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

On August 22, 1956, appellant and co-defendant Dan Casias[1] were indicted [Clk. T. 1][2] in the above-mentioned federal District Court for alleged violation of Title 18,

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[1]Counsel is informed that the co-defendant, Casias, commenced and later abandoned an appeal in this action (for lack of funds). No further reference is made to this co-defendant hereinafter save for the purposes of clarification.

[2]Clk. T. is a shorthand reference to the Clerk's Transcript on Appeal, consisting of pages i-iii, and 1-27, and contained in the fore-part of the transcript of record.

Authority to proceed on typewritten record was granted by Order of the Honorable William Healy, Presiding Judge [Clk. T. 27].

U. S. C., section 111, to-wit: Assaulting a federal officer.[3]

Following appellant's plea of not guilty, the cause was tried by a jury and lasted for two and one-half days. On August 30, 1956, the jury returned a guilty verdict against appellant (and the co-defendant).[4]

Appellant filed a motion for judgment of acquittal (and in the alternative, for a new trial) on September 6, 1956 [Clk. T. 3-5]. Said motion was argued before the trial court on September 18, 1956 [R. 258-263], and denied the same day [Clk. T. 6].

On September 24, 1956, the trial judge pronounced judgment and sentenced appellant to serve one year in the penitentiary [Clk. T. 12].[5]

Notice of Appeal from said Judgment, Orders and Sentence was filed September 27, 1956 [Clk. T. 14-15], and a specification of the points to be relied upon was submitted pursuant to Rule 17(6) of the Rules of this Court [Clk. T. 22].

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[3]§111. *Assaulting, resisting, or impeding certain officers or employees.*

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[4]Clk. T. 2.

[5]The probation officer recommended denial of probation on the sole ground that the offense herein involved a federal officer [Clk. T. 11].

Because of delays in the preparation of the Reporter's Transcript, a motion to enlarge time within which to docket the Appeal was filed and granted by the trial court on November 7, 1956.

Appellant remains out on bond pending disposition of this appeal [Clk. T. 19].

Statement of the Case.

On Sunday, May 20, 1956, William Sherrill, an investigator for the Immigration-Naturalization Service [R. 16],[6] entered the La Chaquita Cafe in East Los Angeles, California, for the purpose of making an arrest [R. 39]. Armed with a gun and badge, but no warrant,[7] Sherrill went directly to the rear of the Cafe, and methodically questioned each patron at the bar as to his place of origin [R. 21, 42]. The circumstances which purportedly precipitated this investigation were these:

About six days earlier, Sherrill received a tip from an unnamed informant that three "illegals"[8] were frequenting the Cafe on week ends [R. 17; see also Gov. Ex. 1]. Sherrill reported this intelligence to his superiors, who, in turn, assigned him to investigate the matter the following week end, if and when any of them should reappear [R. 17-19].

Sunday evening, about six o'clock, Sherrill received the informer at his home, one block from the Cafe [R. 32, 79], and was told that one of the three "illegals" was

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[6]R. refers to the Reporter's Transcript of the oral proceedings had in the trial court and contained in the transcript of record, pages 1-274.

[7]See R. 39-40.

[8]The term "illegals" refers to aliens unlawfully in the United States.

there, wearing a white shirt, a mustache, and describing him as tall and heavily built [R. 20] ". . . as unusually large for a man of Mexican descent" [R. 34].

When the informer left, Sherrill changed into street clothes [R. 37], and drove to Montebello (California) to make arrangements for the overnight housing of his potential prisoners [R. 19-20]. With some difficulty, he located a police station [R. 20, 38], but was advised by the officer on duty that the station had no feeding facilities for federal prisoners [R. 20]. Sherrill then made a telephone call to the East Los Angeles Sheriff's Office, with whom he was able at last to make such arrangements [R. 20].

Sherrill then returned home to pick up his gun and handcuffs and drove off to the Cafe [R. 21, 80].

Appellant was seated at the bar conversing with a friend when Sherrill entered [R. 161]. But their conversation was interrupted when Sherrill attempted to interrogate appellant [R. 161]. The evidence is conflicting as to whether or not Sherrill identified himself to appellant at that time [R. 23, 163]; but it is not controverted that appellant shoved the officer aside in the belief he was drunk and resumed his conversation [R. 161]. Moments later, appellant heard a scuffle, to his rear, turned, and saw Sherrill, gun in hand, struggling with two men [R. 162].

Apparently, Sherrill had observed a hulky, white-shirted man, with a mustache, "edging toward the front door" [R. 23], and ran over to intercept him [R. 23]. Identifying himself to that person, Sherrill demanded to know his place of birth [R. 24]. The man answered in English, "What difference does it make?" [R. 24]. While Sherrill was thus engaged with the suspect, someone

grabbed him from the rear, and the struggle ensued [R. 24].

When appellant observed Sherrill holding a gun on the two men, he entered the fray for the limited purpose of disarming him [R. 163]. But appellant was unsuccessful and was quickly subdued [R. 164]. Sherrill then placed him under arrest, locked a handcuff on one of appellant's wrists, and led him back to the bar [R. 74, 164].

A moment later, Sherrill was again seized from behind, overcome and disarmed, and his revolver was hidden [R. 75-77]. That ended the altercation [R. 76].

Thereafter, Sherrill removed the handcuffs from appellant's wrist, and left the Cafe to call for help [R. 27]. During his absence most of the customers left; but appellant remained [R. 78].[9] Sherrill returned a few minutes later, followed by Sheriff's deputies, and the appellant was taken into custody [R. 28].

Issues Presented.

That appellant interfered with Sherrill is not disputed. Moreover, Sherrill's testimony that he identified himself to appellant prior thereto [R. 23], if believed, is probably sufficient evidence of scienter as a matter of law, although it may be noted that such testimony was self-serving and uncorroborated.

Only two issues, therefore, confront this Court. The first is whether Sherrill was engaged in the performance

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[9]Sherrill testified on cross-examination as follows [R. 45]:

"Q. And while you were gone, they could have escaped; is that true? A. They could have, yes.

Q. At the time you went to call the sheriffs you didn't know the names of the defendants, did you? A. No, I did not."

of an official duty within the meaning of the penal statute at bar when he entered the La Chaquita Cafe to make an arrest without a warrant, and when he interrogated patrons of the Cafe without warrant.

This question was raised during trial when appellant made a motion for judgment of acquittal upon the close of the government's evidence [R. 153-157], at the close of all the evidence [R. 238], and after the jury verdict of guilty, upon a motion for judgment of acquittal, or in the alternative, for a new trial [Clk. T. 3-5; R. 258-263]. All of these motions were denied by the trial court [R. 157, 238; Clk. T. 6].

The second question which this court is asked to consider is whether or not the trial judge committed reversible error in excluding evidence as the nature and identity of Sherrill's informer [R. 35-36]. This point was also raised on appellant's motion for judgment of acquittal [Clk. T. 4], and discussed in his memorandum of points and authorities in support thereof (not included in the record at bar).[10]

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[10]It may be further observed that the probation report [Clk. T. 8-11] reflects an exemplary background of steady employment, good military service record, no prior criminal record and a fine family. Yet, it recommends denial of probation because of the offense involved. At the hearing for sentence, counsel for appellant urged that the recommendation was not only unfair upon the facts at bar, but that the probation statute (18 U. S. C. A., sec. 3651) does not distinguish the offense herein alleged from any other not involving the death penalty or life imprisonment [R. 265-268]. When viewed upon the record at bar, the sentence of appellant to a year in prison seems harsh and unjust, if not error for failure to exercise discretion.

Specification of Errors Relied Upon.

1. Error in the trial court's denial of appellant's motion for judgment of acquittal at the close of government's evidence, at the close of all the evidence and after jury verdict, in that the plaintiff has failed to carry its burden of proving that Sherrill was engaged in the performance of an official duty at the time the alleged offense was committed.

2. Error in the trial court's denial of appellant's motion for judgment of acquittal in that the jury's verdict convicting appellant was not supported by substantial evidence that Sherrill was performing an official duty at the time of the alleged offense.

3. Error of the trial court in denying appellant's motion for judgment of acquittal in that jury verdict convicting appellant was contrary to the weight of the evidence indicating that Sherrill was not engaged in the performance of an official duty at the time of the alleged offense.

4. Error of the trial court in excluding evidence as to the identity of Sherrill's informer, and denying appellant the right to inquire into that subject.

The prosecution objected to such inquiry on the ground that public policy favors protection of informants against possible harm resulting from their disclosure [R. 35].

Appellant argued that the question went to the issue of whether or not Sherrill was performing his official duties at the time of the alleged offense—*i.e.*, whether Sherrill was justified in relying solely upon an informer's word in entering the La Chaquita Cafe [R. 36].[11]

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[11]See also footnote 9, *supra*.

ARGUMENT.

I.

Sherrill, the Immigration Officer, Was Not Engaged in the Performance of His Official Duties at the Time the Alleged Offense Was Committed.

A.

Preliminary Statement.

Appellant was charged with, and convicted of, violating Title 8, U. S. C. A., section 111, in that he forcibly assaulted and interfered with William Sherrill, an immigration officer, who, as appellant is purported to have known, was engaged in the performance of his official duties [Clk. T. 1].

Appellant contends that as a matter of law, Sherrill was not performing his office lawfully at the time of the alleged offense, and that, therefore, any interference therewith did not offend section 111 (*United States v. Di Re,* 332 U. S. 581, 594; *Alexander, The Law of Arrest* (1949), Vol. I, p. 498; *cf. Johnson v. United States,* 333 U. S. 10, 16).[12]

It is axiomatic that any society has the right and duty to guard itself from those who plunder it, or disregard its laws. Accordingly, such Society may appoint agents to keep the public peace and enforce its statutes, and vest in them authority to apprehend persons reasonably thought guilty of breaching same. In consideration for effective security from lawlessness, the individual may be required to surrender a measure of his liberty and dignity. But such Society—at least ours—then owes a duty to protect

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[12]Whether appellant may have violated some other federal or state statute, or is liable to the officer in tort, is, of course, not before the Court.

its constituents from the overzealous guardianship of its watchmen. A safeguard is thus to be found in the Fourth Amendment to the Federal Constitution which declares:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It got there because history taught "that the police acting on their own cannot be trusted" (*McDonald v. United States,* 335 U. S. 451, 456). Those lessons have been noted with sufficient frequency that they need no repetition here. (*Boyd v. United States,* 116 U. S. 616, 627-630; *Sgro v. United States,* 287 U. S. 206, 210; *cf. McDonald v. United States, supra,* p. 556; *United States v. Di Re, supra,* p. 595).

It is enough to reaffirm that ours is a government of laws, not of men; and that the lawless enforcement of the law puts the government in the role of law breaker. That result is avoided by balancing the interests of the State against the human rights of the citizen. Under such a standard, peace officers are protected against wrongful interference with their duties only so long as the methods which they employ do not tend to destroy the very foundations of the system they are assigned to safeguard.

B.

Sherrill Manifestly Exceeded His Authority in Entering the La Chaquita Cafe to Make an Arrest Without a Warrant, and Hence Was Not Performing an Official Duty within the Meaning of 18 U. S. C. A., Section 111.

At common law, a private citizen had the power to arrest without warrant for a felony actually committed if he had reasonable cause to believe the arrestee committed it (*United States v. Coplon* (C. C. A. 2), 185 F. 2d 629, 634). The peace officer had those powers, and additionally, the right to arrest for felony, though none had been committed, if he had reasonable grounds for believing the person arrested committed it (*United States v. Coplon, supra*).

With some modification, these rules have been codified in California, and are probably indigenous to most other States. (Calif. Pen. Code, secs. 836, 837; 4 Am. Jur., sec. 25, p. 18).

However, in the case at bar, immigration officers draw their powers of arrest directly from a federal statute (8 U. S. C. A., sec. 1357(a)), and not from the California or common law of arrest (see: *United States v. Di Re, supra,* p. 589).

Section 1357(a)(2) empowers immigration officers to make arrests without warrant *only* if he has reason to believe the arrestee is an alien unlawfully in the country, *and* that there is a likelihood that such person will escape before a warrant can be obtained (see Appendix). The latter condition obviously narrows the arresting powers of immigration agents beyond that which they would have possessed at common law.[13] Presumably, Congress was

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[13]Compare the Second Circuit's view of a similar statute in *Coplon v. United States,* 185 F. 2d 629, 634-636, cert. den., 342 U. S. 920.

mindful of the inconvenience and humiliation to innocent persons detained without *just cause,* and chose to deposit in *other* than the arresting officer, *except in emergencies,* the determination of whether there is probable cause for an arrest (compare: *McDonald v. United States,* 335 U. S. 451, 455-456; *United States v. Lefkowitz,* 285 U. S. 452, 464; *United States v. Coplon, supra,* pp. 634-635; see: Attorney General's regulations, 17 F. R., p. 11513, sec. 242.12).[14]

It is crystal clear from Sherrill's own testimony that his entry into the La Chaquita Cafe to make an arrest without a warrant was not predicated upon a reasonable belief that (1) an alien was there who was illegally in the country, and (2) that such person was likely to escape before a warrant for his arrest could be obtained.

1.

SHERRILL ACTED SOLELY UPON THE WORD OF AN INFORMER WHICH, WITHOUT MORE, DID NOT JUSTIFY AN ARREST WITHOUT A WARRANT.

Sherrill admitted entering the Cafe for the express purpose of making an arrest of an alleged "illegal" [R. 39]. Yet, the *only* basis for his belief that an "illegal" was in the Cafe, and was subject to arrest, was upon the unverified, unsworn statement of an unnamed informer [R. 37]. There is absolutely no testimony or evidence in the record at bar that the informer was, or had proved reliable; and the only clue as to why Sherrill did not first seek a warrant was his voluntary assertion that—

> "Under the Act of Congress, I may arrest without Warrant" [R. 39].

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[14]Under 17 F. R. 242.1, authority for issuing warrants of arrest is left in certain designated officers, all of whom would be Sherrill's superiors. See Appendix.

The fact is, however, that the evaluation of the reliability and sufficiency of information forming the basis for the arrest of any person is a matter which both the Congress and the Attorney General entrusted exclusively to Sherrill's superiors (see: 17 F. R., secs 242.1, 242.12 and 242.13, Appendix; see also: 17 F. R., pp. 11512-11514, secs. 242.11(c) and (d)).

Besides, the bare word of an informer—particularly one not shown to have proved trustworthy—does not equip a peace officer with *just cause* for making an arrest with or without a warrant (*Nathanson v. United States,* 290 U. S. 41, 47; *Grau v. United States,* 287 U. S. 124; see also: *Brinegar v. United States,* 338 U. S. 160, 175-176; *Johnson v. United States,* 333 U. S. 10, 16-17; *Carroll v. United States,* 267 U. S. 132, 161-162). This is not to say that an informer's report cannot furnish a basis for an arrest where the officer has acquired personal knowledge of facts tending to corroborate it. But here there was none! There is no independent evidence indicating that the La Chaquita Cafe was a regular hang-out for "illegals"; or, that the designated "illegal" was previously under the surveillance of the Immigration Service; or that the "illegal" was about to flee—indeed, there is not even any evidence as to the grounds the informer had for allegedly asserting the presence of aliens in the Cafe who had no right to be there.

Thus, Sherrill's entry into the La Chaquita for the purpose of making an arrest hangs upon the slender reed of suspicion. Fortunately, mere suspicion will not sustain the issuance of a warrant of arrest (*Nathanson v. United States,* 290 U. S. 41, 47; *cf.* 17 F. R., secs. 242.12 and 242.13). How then can it be expected to support an arrest without one? Of course, it cannot be-

cause both 8 U. S. C. A., section 1357(a), and the Fourth Amendment forbid such "rash and unreasonable interferences with [an individual's] privacy, and from unfounded charges of crime" (*Brinegar v. United States, supra,* p. 176).

2.

SHERRILL HAD NO REASONABLE CAUSE FOR BELIEVING—AND IN FACT HAD NO BELIEF—THAT THE "ILLEGAL" WAS LIKELY TO ESCAPE BEFORE A WARRANT COULD BE OBTAINED.

Furthermore, there was ample time for Sherrill to procure a warrant before making the arrest, as he well knew; and therefore, his entry into the La Chaquita Cafe without one was unjustified.

Actually, the information which Sherrill received that Sunday afternoon came as no surprise—if it came at all. He and his *superiors* had been expecting it for almost a week [R. 13, 17].

Moreover, Sherrill's conduct following his receipt of the informer's message destroys any inference that escape of the "illegal" was anticipated imminently. For although Sherrill lived only *one* block from the Cafe [R. 32, 79], it took him no less than ONE HOUR to get there [R. 21, 33, 81].

First he slipped into a shirt and trousers, and possibly put on a tie [R. 37]; then, notwithstanding the presence of a phone near his living quarters [R. 86], he *drove* to Montebello in order to—

> ". . . find a place to book the man in case I had him, because I didn't feel like driving into Los Angeles" [R. 79].

But when informed at the Montebello Police Station that there were no available facilities for feeding federal prisoners, he *telephoned* the East Los Angeles Sheriff's office, and made such arrangements there [R. 80].

Sherrill thereafter *returned home* for his gun and handcuffs which he had left behind because:

> "I didn't care to put on a holster and all the equipment necessary to carry a gun . . ." [R. 85].

But a moment later he complains—

> ". . . If you have carried a revolver in your side pants pocket, it is not exactly comfortable or handy" [R. 85].

In short, Sherrill was in no hurry; and by the time he reached the Cafe, sufficient time had elapsed during which a warrant could have been procured, assuming the issuance of one was proper in light of the evidence he had.

Nevertheless, Sherrill entered the Cafe without a warrant, and, ignoring the "illegal" who was purportedly the cause of his visit, and who apparently was still there [R. 23], he proceeded toward the rear of the establishment, and began interrogating persons who concededly did not fit the description of the man he was seeking [R. 42, 71].

These are patently not the acts of an immigration agent inspired by a reasonable belief that escape of an "illegal" was likely if a warrant was first sought. Sherrill does not even excuse his failure to first procure a warrant upon the usual (though improper) grounds of inconvenience, but rather upon what he construes to be his perogative [R. 39]. As reflected by the record at bar, Sherrill's actions are those of an officer who prefers not to subject his purpose or powers to the distinterested consideration of one authorized to do so. That is the kind of over-

zealous enforcement of the law which the judiciary has so emphatically condemned (see: *Johnson v. United States, supra; United States v. Di Re,* 332 U. S. 581; *McDonald v. United States,* 335 U. S. 451).

In sum, Sherrill's entry into the La Chaquita Cafe for the purpose of making an arrest was so far beyond the scope of his office that section 111 cannot reach it (*Coplon v. United States* (C. C. A. 2), 185 F. 2d 629, 635-636, cert. den., 342 U. S. 920). The *Coplon* case is particularly analogous to the one at bar, because the statutory powers of arrest granted the F.B.I. agents there involved contained virtually the same limitations as those given Sherrill under 8 U. S. C. A., section 1357(a). Thus, in *Coplon,* Congress had provided F.B.I. agents with power to arrest without warrant—

> ". . . where the person making the arrest has reasonable grounds to believe that . . . there is a likelihood of his escaping before a warrant can be obtained for his arrest" (18 U. S. C. A., sec. 3052 (1948)) (see Appendix).

The F.B.I. agents had Coplon under surveillance for several months, during which time they observed her surreptitious comings and goings, and furtive meetings with a Russian. The agents finally arrested her, but without a warrant, and seized some government documents found in her possession. The prosecution was permitted at trial, to introduce the documents thus obtained into evidence. and the defendant was ultimately convicted. On appeal, Judge Learned Hand, writing for a unanimous Court, set aside the conviction upon two grounds, one of which was that the arrest of Miss Coplon had been illegal because made without a warrant, and therefore, the evidence found upon her could not support the conviction. What is sig-

nificant to the case at bar, however, is that Coplon's arrest was held unlawful because the F.B.I. agents had no power under the aforementioned statute to make it without a warrant except in an emergency. And Judge Hand determined as a matter of law that the facts of the case presented no such emergency.

The post-*Coplon* legislative history also deserves a brief comment because it tends to serve as a gloss on how Congress intended the "likelihood of escape" clause in section 1357(a) to be construed. Three weeks after the *Coplon* decision was published, Congress amended 18 U. S. C. A., section 3052, by deleting the emergency clause (see: 18 U. S. C. A., sec. 3052, as amended, January 10, 1951, chap. 1221, sec. 1, 64 Stat. 1239, Appendix herein). Yet, the "likelihood of escape" clause was retained in section 1357(a)(2) of the Immigration and Nationality Act of 1952.

It may be contended that the *Coplon* case is not governing here because no arrest was actually made;[15] but this fact in no way cures the defect in Sherrill's status. For one thing, Sherrill flatly stated that he went to the Cafe to make an arrest [R. 39]. He had made elaborate pre-arrangements for the disposition of his quarry [R. 79-80]. And, it is with this purpose and intent that the government seeks to put Sherrill on the footing of an officer engaged in the performance of an official duty. It follows that since Sherrill's objective was, under the circumstances, illegal, that characteristic colors his entire mission while in the Cafe (*cf. Johnson v. United States,* 333 U. S. 10).

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[15]A point conceded *arguendo* only since it would appear that an arrest was made when the officer detained the man he was looking for [see: R. 71].

3.

SHERRILL'S ARBITRARY INTERROGATION OF PATRONS IN THE LA CHAQUITA CAFE IS FURTHER EVIDENCE THAT HE WAS NOT ENGAGED IN THE PERFORMANCE OF AN OFFICIAL DUTY AT THE TIME OF THE ALLEGED DEFENSE.

Moreover, Sherrill's improper purpose and intent upon entering the La Chaquita Cafe was supplemented by other excesses of authority during his visit.

Thus, Sherrill testified [at R. 42] that upon entering the Cafe—

> "A. I came to the rear seat and on the right-hand side of each person I would crowd in between him and the person on his right, show him my credentials in front of him, stating, 'I am an immigration officer and I would like to know your place of birth, please.'
>
> Q. And you proceeded down toward the front? A. Toward the front of the bar, yes.
>
> Q. And you asked everbody seated there that same information? A. That same information.
>
> Q. And of course you ultimately came to Mr. Amaya and asked him the same question for identification; is that correct? A. Yes, that is correct.
>
> Q. Was Mr. Amaya wearing a mustache at that time? A. I don't know whether he was or not.
>
> Q. Wouldn't have made any difference at all? A. It wouldn't have made any difference."

8 U. S. C. A. 1357(1) provides Immigration Officers with power to interrogate without warrant:

> ". . . any alien or person believed to be an alien as to his right to be or to remain in the United States."

Nevertheless, it is clear from Sherrill's testimony, that he had no belief at all—let alone a reasonable one—that the persons he interrogated were aliens, and/or were unlawfully in the United States. For Sherrill, "it wouldn't have made any difference" [R. 42]; it was "just normal procedure" to interrogate persons at random as to their right to be there [R. 71].

The Fourth Amendment to the Constitution gives every individual in this country the right to be let alone—and particularly the right not to be molested or annoyed arbitrarily and unnecessarily by the police (see: *Carroll v. United States,* 267 U. S. 132, 153-154; *cf. Brinegar v. United States,* 338 U. S. 160, 176; *McDonald v. United States,* 335 U. S. 451, 455). This is one of the basic human rights which distinguishes our system from the police state (*Johnson v. United States,* 333 U. S. 10, 17). Consequently, interference with such arbitrary and capricious police activity as here practiced cannot be deemed violative of section 111.

II.

It Was Prejudicial Error for the Trial Court to Preclude Appellant's Counsel From Inquiring Into the Identity of Sherrill's Alleged Informer.

The sole basis for Sherrill's purported belief that there was an "illegal" in the La Chaquita Cafe was intelligence to that effect said to have been related to him by an informer [R. 19]. Having chosen to act upon that information, he thereby thrust into issue the reasonableness of his decision. It was, therefore, appropriate for appellant to put that decision to the test of cross-examination by inquiring into the nature and identity of its source. (*Wilson v. United States* (C. C. A. 3), 59 F. 2d 390, 392; *United States v. Blich* (D. C. D. Wyo.), 45 F. 2d 627, 629; compare *Coplon v. United States, supra,* at p. 638).

But the prosecution objected to such inquiry, not for immateriality, but—

> ". . . on the grounds that the courts have consistently held that the names of informants are not to be disclosed, for their own protection, for quite obvious reasons. In this case, it is even more obvious that the name of the informant should not be disclosed" [R. 35].

The validity of this objection is questionable inasmuch as the accused were not the subjects of the informer's accusations. Nevertheless, the government's objection was sustained by the trial court.

It is respectfully submitted that the ruling of the learned trial judge sustaining the government's objection was error which deprived appellant of due process of law and of his right to have compulsory process for obtaining witnesses in his favor (Fifth and Sixth Amendments to the Federal Constitution).

The government had the burden of proving that Sherrill was performing an official duty at the time of the alleged offense and performing it properly. The prosecution could not do so—at least under the circumstances posed by the record at bar—without showing that the officer acted upon probable cause in entering the La Chaquita Cafe. The fact of probable cause was in turn wholly dependent upon the existence and reliability of the informer, and the substantiality and nature of what he had to say. Since those facts were apparently enough to motivate Sherrill to interrogate and arrest innocent persons without a warrant on a claim of reasonable cause, it was for the trier of fact to determine the justification for that claim. A Court or jury could not do so, of course, unless it was able to pass upon the same "facts"

which had confronted Sherrill. His belief need not have been that of the trier of fact, in which case, the appellant's acquittal would be assured (*United States v. Blich, supra; cf. Wilson v. United States, supra*).

Undoubtedly, there are certain cases wherein the prosecution may conceal the identity of informers, and cannot be required to divulge it. But here the government seeks to conceal the very facts with which it colors Sherrill's authority. To permit so unfair an advantage over an accused would be unconscionable (*Coplon v. United States, supra,* at p. 638).

> "If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled" (*Wilson v. United States* (C. C. A. 3), 59 F. 2d 390, 392).

In the *Wilson* case, a government witness testified that entry into the private hall of an organization had been effected by means of a key furnished by one of the members. When asked to identify him, the witness refused, and was adjudged in contempt of court. That judgment was sustained on appeal for the reasons just quoted.

That result, however, was unnecessarily harsh, and is not advocated here. Rather, the government should be put to a choice: Either expose the evidence upon which it relies, so that the appellant may have an opportunity to meet it, or suppress the information, and abandon the prosecution (*Coplon v. United States, supra,* p. 638, where the issue was framed around State secrets; *cf. Andolschek v. United States* (C. C. A. 2), 142 F. 2d 503, 506; *Delaney v. United States* (C. C. A. 1), 199 F. 2d 107; *Christoffel v. United States* (C. C. A. D. C.), 200

F. 2d 734. See also: *United States v. Watkins* (D. C. S. D. N. Y.), 67 Fed. Supp. 554, 556, aff'd, 158 F. 2d 853).

Such a doctrine may be a compromise, but its logic is sound for it leaves to the government the choice of pursuing that course of action which it regards as most affected by the public interest—prosecution or suppression—without penalizing the accused by the removal of evidence vital to his defense (*Coplon v. United States, supra,* p. 638). Indeed, it is a compromise which could be adopted only in a country which deeply values human life and liberty.

That choice was available to the government here; it chose prosecution. Hence, the ruling of the trial judge denied appellant his constitutional rights.

Conclusion.

The judgment of conviction should be vacated, and the cause remanded with directions to enter judgment of acquittal, or in the alternative, to grant appellant a new trial.

Respectfully submitted,

Hugh R. Manes,

Attorney for Appellant.

APPENDIX.

Other Statutes Involved or Compared.

I.

8 U. S. C. A., sec. 1357(a):

"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States; . . ."

II.

18 U. S. C., sec. 3052 (1948):

"The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony

and there is a likelihood of his escaping before a warrant can be obtained for his arrest.

III.

18 U. S. C., sec. 3052 (as amended January 10, 1951):

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

IV.

Regulations of Immigration and Naturalization Service involved (references to 17 F. R., pp. 11512-11513):

Sec. 242.1. WARRANT OF ARREST. (a) *Issuance.* Subject to the limitations in this part, district directors, district enforcement officers, district officers, and the assistant district officers who are in charge of investigations, and officers in charge of sub-offices may issue warrants of arrest.

Sec. 242.12. APPLICATIONS FOR WARRANTS OF ARREST. If, after preliminary investigation, the investigating officer determines that a prima facie case for deportation of an alien exists, he shall apply for a warrant of arrest to an officer having authority to issue warrants of arrest.

Sec. 242.13. ISSUANCE OF WARRANTS OF ARREST. Any officer mentioned in sec. 242.1 (a), who receives an application for a warrant of arrest may issue such warrant in any case in which he determines that a prima facie case for deportation has been established.

No. 15388.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANASTASIO LAWRENCE AMAYA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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ANASTASIO LAWRENCE AMAYA,

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant and co-defendant Dan Casias were indicted by the Grand Jury for the Southern District of California on August 22, 1956, on one count of assaulting a federal officer. [Clk. T. 1.][1]

On August 28, 1956, the defendants entered a plea of not guilty to the indictment. [Clk. T. 17.] Jury trial began the same day in the United States District Court for the Southern District of California, the Honorable Thurmond Clarke, presiding. [*Ibid.*] The trial was concluded by a verdict of guilty as to each defendant on August 30, 1956. [Clk. T. 2.]

On September 24, 1956, it was adjudged that appellant be committed to the custody of the Attorney General for a period of one year. [Clk. T. 12.]

On September 27, 1956, a timely notice of appeal was filed. [Clk. T. 14-15.]

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[1]Clk. T. refers to the Clerk's Transcript of Record.

The District Court had jurisdiction of this action under United States Code, Title 18, Section 111.

This Court has jurisdiction under the provisions of United States Code, Title 28, Section 1291, and Rules 37 and 39 of the Federal Rules of Criminal Procedure, United States Code Annotated, Title 18.

Statement of the Case.

On May 14, 1956, Investigator William Sherrill of the Immigration and Naturalization Service, advised his superiors that an informant had told him three aliens illegally in the United States frequented the La Chiquita bar in Pico, California. [R. 12, 18.][2] Sherrill's supervisor assigned the case to him and told him to take home a Government vehicle in connection therewith during the period May 16, 17 and 18, 1956. [R. 12-13, 19.] Sherrill was ordered to be ready to actively work the case should further information relating to the identity of the aliens be forthcoming. [R. 12.]

On May 18, 1956, a Sunday, at approximately 6:00 P. M., the informant came to Sherrill's home, reported that one of the aliens mentioned was then at the La Chiquita, and gave a description of the purported alien. [R. 19, 20.] After making arrangements to book any prisoners he might take, Sherrill returned home to obtain his gun and handcuffs, and then proceeded to the bar to ascertain whether in fact the person in the bar was an alien illegally in the United States. [R. 19-21, 39.]

After entering the bar, Sherrill identified himself to various patrons seated at the bar, exhibiting his badge and

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[2]R. will refer to the Reporter's Transcript, contained in the Transcript of Record.

stating that he was an immigration officer, and requested that they state their place of birth. [R. 21.] One of the persons so spoken to was the appellant. [R. 23, 41-42.]

After questioning politely [R. 130] four or five persons, the officer noticed a man edging toward the front door of the bar who answered the description that the informant had provided. [R. 23.] Sherrill stopped him, stated that he was an immigration officer, exhibited his credentials, and asked his place of birth. [R. 23-24.] After receiving a non-responsive answer, Investigator Sherrill repeated his question. [R. 24.]

At that moment, someone pinned his arms behind him and spun him around to where appellant was then standing. [R. 24.] Sherrill was repeatedly struck by appellant and others in the face, neck and chest while so pinioned. [R. 24-25.] After succeeding in freeing a hand and drawing his revolver, which had been in his pants pocket, his assailants scattered, and Sherrill chased appellant into the rear storeroom. [R. 25.] At Sherrill's order, appellant dropped a beer bottle which he had unsuccessfully attempted to turn into a cutting instrument. One of appellant's wrists was handcuffed, the officer holding the other cuff by his hand. [R. 25, 74.]

After the two re-entered the bar, the officer attempted to handcuff appellant to another person who had struck him, whereupon co-defendant Casias grabbed him from the rear, and, with others, twisted the gun from the officer's hand, tearing the flesh of Sherrill's thumb. [R. 25-26. 109.] After being kicked while on the floor, Sherrill was molested no further after he complied with the request of half a dozen or so belligerants to remove the handcuffs from appellant's wrist. [R. 26-27.] His gun was kept from him and hidden. [R. 46, 218.]

ARGUMENT.

I.

The Assaulted Officer Was Engaged in the Performance of His Official Duties.

A. Inquiry as to Probable Cause for Arrest Is Irrelevant Where No Arrest Takes Place.

Appellant's first argument is that the immigration officer was not engaged in the performance of his official duties at the time the offense took place because there were insufficient grounds for arresting the purported alien. Whatever merit this point might have under different factual circumstances, its advancement here avails appellant nothing since the supposedly illegal arrest never occurred. At the time the officer was attacked by appellant and others, an arrest, legal or otherwise, was not taking place. All that Officer Sherrill had done, up to the point of appellant's assault, was to stop and question a person evidently anxious to leave premises in which an announced immigration official was inquiring as to the citizenship of the occupants. No arrest having been made, it is pointless to conjecture what would have happened had the attack not taken place, for *at the time of appellant's offense,* the officer was lawfully performing his duties respecting the enforcement of immigration laws.

Arguments identical to that of the appellant have been made in other recent appellate cases, and have been disposed of summarily.

In *Carter v. United States,* 231 F. 2d 232 (C. A. 5, 1956), cert. den. 76 S. Ct. 1052, Internal Revenue Agents were conducting a search of a bar when Agent Poe noticed the defendant's car approach the bar and stop. Poe went to it, identified himself as a federal agent to its occupants,

opened the car door and started to enter it when the automobile was accelerated, reaching a speed of 60 m.p.h., thereby obstructing and interfering with Poe who was hanging precariously half in and half out of the car. On page 236, it was stated:

> "The remaining complaints have no substance. As an arrest or an attempted arrest at the time Poe first came up to the car was not made, the legality of Poe's or Ponto's actions are in no way affected by the legality or illegality of an arrest which did not take place."

Hall v. United States, 235 F. 2d 248 (C. A. 5, 1956), involved Revenue Agents searching for a fugitive named Parsons. They approached the front of Parson's residence where they saw defendant Hall in a disheveled condition. Upon seeing the agents, the defendant started to depart whereupon the agents called to him to wait, that they wanted to talk to him. They identified themselves as federal officers and a gold badge was in defendant's plain view. Defendant then attempted to draw a pistol from his pocket. A later scuffle ensued which resulted in the charge of a violation of 18 U. S. C. §111. The Court stated:

> "The contention of appellant that the officers had no right to arrest him is without basis as no arrest was attempted at the time the officers first approached Hall."

Cf. Hall v. United States, 222 F. 2d 107 (C. A. 4, 1955), also involving a violation of 18 U. S. C. §111:

> "Questions have been raised as to the right of the officers to seize without warrant an automobile not at the time engaged in violation of the law on the basis of information received as to prior violations; but we need not go into these questions . . . Whether they

would have had a right to seize it without warrant or not, they were unquestionably acting in the discharge of their duty in taking it into possession with the acquiesence of the owner, and appellants had no right to interfere with them. When they did so forcibly, they were guilty of a violation of the statute."

Moreover, there is authority to the effect that even though an agent exceeds the lawful bounds of his office while carrying out an official investigation, the officer nevertheless will be considered to have been engaged in the official performance of his duties within the meaning of a statute penalizing his assault or murder. In *Arwood v. United States,* 134 F. 2d 1007 (C. C. A. 6, 1943), the defendant was convicted of the murder of an Internal Revenue Agent in violation of 18 U. S. C. §253, predecessor statute to 18 U. S. C. §1111, which provided punishment for the killing of a federal officer "while engaged in the performance of his official duties, or on account of the performance of his official duties." Identical language is contained in 18 U. S. C. §111. The Opinion reads, at pages 1010-1011:

"It is uncontroverted that the deceased and his associates . . . were Investigators of the Alcohol Tax Unit, and hence were officers, employees and agents in the service of the Internal Revenue. Further, it is clear that . . . these officers were making investigations. . . . as was their duty . . . They were so engaged when the deceased was killed; and appellant knew who they were and what they were doing.

"Appellant takes a different view of the probative effect of the evidence. He contends that they were not engaged in the performance of their official duties but were making an unlawful invasion of his home,

and an unreasonable search, prohibited by the Fourth Amendment, and that therefore the statute under which he was indicted afforded the deceased no protection.

"We cannot accept this view. *We need not determine whether the deceased and his associates were unlawfully invading appellant's home or were engaged in an unreasonable search.* However pertinent that inquiry might become in a prosecution of appellant for the operation of unregistered distillery, it is not necessary to decision here. The fact remains that the entry of the deceased into the house or upon the premises and any search made there was in the course of the investigation and germane to the performance of the duties of the officers while bona fide acting under the color of authority . . .

"We think the motion for a directed verdict was correctly overruled." (Emphasis added.)

B. The Officer's Entry Into the La Chiquita Was in the Proper Performance of His Official Duties.

At page 16 of his brief, appellant recognizes that no arrest took place in the instant case. This defect is said to be overcome, however, by the fact that Officer Sherrill's objective, purpose and intent was illegal and thus this subjective illegality colors his entire mission at the La Chiquita bar. Although it might be interesting to do so, it seems wholly unnecessary to debate whether, from the very moment he decided to arrest the alien, Sherrill was no longer engaged in the performance of his official duties, even though the arrest never occurred. The premise upon which this unique contention is based is that the officer intended to make an arrest on an uncorroborated tip without sufficient reason to believe the guilt of the person to be arrested. The evidence in the case provides no basis

for the assumption that, *as a matter of law,* such was the intent of the officer. Ignored by appellant is Sherrill's testimony during cross-examination on this very point.

> "Q. In fact, you probably would have arrested anyone who bore this name or description or at least description of such person you were looking for; isn't that true? A. I wouldnt' have arrested anyone. I would have just ascertained whether he was an alien illegally in the United States, and I am competent to do so."

This testimony is evidence of the fact that no illegal objective was in the officer's mind, since if Sherrill had "ascertained," as he had intended to do, that an alien was illegally in the United States, obviously he would have had sufficient reason so to believe.

Appellant never explains just what would have been the reasonable and proper thing for the officer to do. According to appellant's contention, the uncorroborated tip of an informer does not justify an arrest of an alien without a warrant. By the same token, such a tip would seem to be insufficient grounds for a determination that a *prima facie* case for deportation existed, the criterion upon which immigration warrants can be obtained.[3] Therefore, in order to perform his duties of investigating this case, as he had been ordered to do, what course could Sherrill have taken but to proceed to the La Chiquita and ascertain the facts? Once at the bar, Sherrill could have questioned the suspect and might have corroborated the tip, or uncovered grounds such as an admission which alone would have been sufficient to justify the arrest. But those grounds

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[3]Immigration and Naturalization Service Regulation 242.1, Appendix, Appellant's Brief.

could not have been discovered had not the officer entered the bar. Thus the entry was not only the perfectly proper and logical thing to do, but also clearly was the lawful performance of the officer's duty.

Appellant makes a further contention as to the fact that Sherrill had no belief that the alien was likely to escape before a warrant could be obtained, again making his actions illegal and outside the scope of his duties. Again applicable is the counter-argument that no arrest took place, and that, therefore, such a contention is quite irrelevant. Also, as stated above, Sherrill could not have obtained a warrant on the sole basis of an informer's tip; even had that been possible, appellant does not tell us how it could have been obtained from the appropriate immigration officers[4] on a Sunday evening, when there is no one in the offices of the Immigration Service. [R. 40.] Therefore, appellant's emphasis upon the lapse of time between the informer's visit and Sherrill's entry into the bar is pointless, as no warrant could have been procured during that period of time. The only way to have secured a warrant, would have been for the officer to question the alien on the Sunday in question, ascertain his illegal status, get his address, if possible, and report the facts to the appropriate officers the following day. It would be a strange alien, indeed, who would remain available for the service of such a warrant.

Much stress has been laid by appellant upon the case of *United States v. Coplon,* 185 F. 2d (C. A. 2, 1950), the case having been cited seven times in his brief. In that case it was held by the Court of Appeals for the Second Circuit that the arrest therein was invalid since there was

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[4]Regulation 242.1, 242.12, Appendix, Appellant's Brief.

no basis for a finding that F. B. I. agents had had reason to believe defendant Coplon would escape before a warrant could have been obtained. Some of the facts in connection therewith were that Coplon was an employee of the Department of Justice, and her whereabouts and address were at all times known to the F. B. I. which had a total of twenty-four agents assigned to trail her. Furthermore, it was essential to the successful continuance of Coplon's criminal conduct that she retain her position with the Department of Justice. Under these circumstances, the appellate court ruled as a matter of law that there was no emergency justifying an arrest without a warrant. Any attempt to analogize the Coplon facts to the instant situation would be absurd.

C. Interrogation of the Alien Was a Proper Performance of the Officer's Duties.

Appellant also complains of Sherrill's "arbitrary and capricious police activity" in questioning the jovial, peace-loving patrons of the La Chiquita. At the time the assault took place, the officer was questioning a person who had edged away from the bar towards the exit. In view of Sherrill's previous open announcement of his status as an immigration official, the suspect's movements toward the door alone would give him a just reason to inquire as to his nationality. Whether this person was under a duty to reply or not, the officer clearly was not acting outside the scope of his duty by inquiring. It is impossible to see any justification under the circumstances for the alien to have assaulted Sherrill; appellant Amaya certainly stands in no better position. The opinions of *Carter v. United States,* 213 F. 2d 232 (C. A. 5, 1956), and *Hall v. United States,* 235 F. 2d 248 (C. A. 5, 1956), contain peculiarly

appropriate language with respect to this aspect. *Carter v. United States, supra,* p. 235, reads:

> "Nor is this to be viewed as though agent Poe was intent only on a search and subsequent arrest if he found evidence of likely guilt. Poe's function is not so limited. Whatever might, for example, have been Ponto's duty to answer, Poe undoubtedly had the right to ask questions. Ponto could not run him down to keep this from happening."

Hall v. United States, supra, pages 248-249, reads:

> "Appellant contends there is no evidence that the officers had a right to stop and question him or to arrest him . . .
>
> "At the time of the encounter the officers were engaged in their official duties . . . Seeing the condition of Hall and his waiting automobile, they had sufficient grounds to stop and question him, as well as the right to do so. . . . Hall was under no duty to answer, but in refusing to answer he had no right to resort to the attempted use of firearms."

II.

Refusal to Disclose the Identity of the Informant Was Proper Since Disclosure Was Not Material to the Defense of the Accused.

Appellant's second major contention is that the trial court erred in refusing to allow the identity of the informer be revealed upon cross-examination of Officer Sherrill. Appellant reasons that the Government could not show that Sherrill was engaged in the performance of his official duties without showing that "the officer acted upon probable cause in entering the La Chiquita Cafe [and that the] fact of probable cause was in turn wholly dependent upon the existence and reliability of the in-

former, and the substantiality and nature of what he had to say." This argument assumes that the officer needed "probable cause" for entering a public cafe, but this Court held to the contrary in *McWalters v. United States,* 6 F. 2d 224 (C. C. A. 9, 1925):

> "But as the uncontradicted evidence was that the place was a soft drink parlor, open to the public, the agents had a right to enter . . ."

It is true that the law requires the Government to elect between dismissing its prosecution and disclosing the identity of the informer where such disclosure is necessary to a proper defense of an action. The rationale of holdings to such effect was explained in the case of *Roviaro v. United States* ..... U. S. ..... (decided March 25, 1957):

> "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way . . .
>
> "Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.
>
> * * * * * * * *
>
> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the par-

ticular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

The Supreme Court determined that the circumstances of the *Roviaro* case demonstrated that the informer's testimony was highly relevant since the informant had taken a material part in bringing about the possession of the narcotic drugs in question and had been present with the accused at the occurrence of the alleged offense. In the instant case, however, not the slightest reason exists for disclosure of the informant, since no justification of, or probable cause for the entry of the officer into the public place is needed. Nor is justification for the interrogation needed, for at the very moment of the instant assault, Sherrill was questioning a person to whom Sherrill's attention had been directed by said person's furtive efforts to leave the La Chiquita, in which bar Sherrill previously had announced his identity and expressed his desire to inquire into the nationality of the patrons. Under such circumstances alone, the officer had sufficient reason to inquire into said person's nationality.

Where no purpose is served by disclosing the identity of an informant, the courts have forbade such disclosure, because "To inform is a statutory duty, and sound public policy forbids exposing informers to possible, even probable evil consequences." (*McInes v. United States,* 62 F. 2d 180 (C. C. A. 9, 1932):

Scher v. United States, 305 U. S. 251, 254 (1938):

> "At the trial, counsel undertook to question the arresting officers relative to the source of information which led them to observe petitioner's actions."

* * * * * * * *

> "In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officer's action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. Justification is not sought because of honest belief based upon credible information. . . ."

Sorrentino v. United States, 163 F. 2d 627, 628-629 (C. C. A. 9, 1947):

> "If the person whom Grady called an informer was an informer and nothing more, appellant would not have been entitled to have his identity disclosed."

Smith v. United States, 9 F. 2d 386, 387 (C. C. A. 9, 1925):

> "The government's evidence tended to show that the defendants were arrested as they were endeavoring to land liquor . . . [A] federal prohibition agent . . . testified on cross-examination that he and his associates had information that defendants were to land liquor at the time and place of the arrest. Counsel for defendants then asked: 'Where did you get that information?' The court sustained the government's objection to this testimony . . . The ruling was correct. The testimony sought would have had no tendency to prove either the guilt or innocence of defendants."

Disclosure of the informant in the instant case would have served only to jeopardize his life or limb, and would not have been material to the defense of the case. Under such circumstances, the trial court did not err in refusing to allow disclosure.

Conclusion.

Much has been said in Appellant's brief concerning the lawlessness of the immigration officer and the right of the patrons of the La Chiquita to be free from unnecessary molestation and annoyance by over-zealous policemen. The evidence in the case, at least that which had to be believed by the jury in order for the appellant to have been found guilty, demonstrates that the officer peacefully was doing his duty when he was brutally attacked by a number of said patrons, including the appellant who had spent much of that Sunday afternoon drinking in three different bars. [R. 169.] It approaches the fantastic to contend that the officer and not the appellant was the lawbreaker.

It cannot be said that, as a matter of law, the officer was not engaged in performance of his official duties at the time appellant's attack occurred. As to the non-disclosure of the informant, such was not necessary under the "balancing the public interest" test so recently laid down by the Supreme Court. Therefore, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

Inquiry as to Probable Cause Was Relevant to the Issue of the Officer's Authority.

Respondent contends that the question of whether Sherrill had probable cause to make an arrest is not in the case because no arrest took place. Quotations from several decisions are set forth in the government's brief in an effort to give substance to this thesis. Yet, examination of those decisions reveal not only that the Courts do in fact consider whether probable cause existed for the attempted performance of duty; but in *Carter v. United States,* 231 U. S. 232, 235, a finding to this effect seems to have been deemed a prerequisite to a conviction under 18 U. S. C. A. Sec. 111.

It is clear why. The mere flashing of a badge in a crowded cafe may color the officer as an agent of government; but this gesture could not confer authority in him which was never his (*Whipp v. United States,* 47 F. 2d 496), nor would it sanctify an abuse of authority which was his (*Screws v. United States,* 325 U. S. 91; *Williams v. United States,* 341 U. S. 97). A police badge is not a substitute for authority—it is merely a symbol of it. And a symbol cannot justify what the law forbids. No matter what his reason for being in the cafe, if Sherrill sought to give his presence and subsequent conduct while there an official character, then it was certainly appropriate to discover under what authority he purported to act, and how he exercised it. If Sherrill had no authority—under the circumstances—to interrogate, to detain, and to attempt the arrest of patrons in the cafe; or, if by these acts, he exceeded his authority, then it is crystal clear that he was not performing his duties lawfully.

The government does not seriously controvert this point, but prefers to clothe Sherrill's conduct with legality by limiting consideration of his activities solely to the moment of the alleged offense. This is more than Sherrill himself chose to do; and overlooks the circumstances which undoubtedly provoked the attack on him.

The short of it is that appellant's guilt could not be measured solely by the legality or illegality of what Sherrill was doing at the time of the alleged offense (*Whipp v. United States,* 47 F. 2d 496 (C. C. A. 6, 1939); *Carter v. United States,* 231 F. 2d 232, 235 (C. C. A. 5, 1956)). The authority under which Sherrill purported to act was indivisible; either he had a right—*i.e.,* probable cause—to conduct an investigation in the cafe, or he did

not. If his entry and interrogation therein was without authority, his effort to confirm a mere suspicion could not restore it (*cf. Johnson v. United States,* 333 U. S. 10).

In any event, the government was required to prove that at the time of the alleged assault, Sherrill was *lawfully* performing an official duty. The issue of probable cause entered into the case whether Sherrill was making an arrest, or merely laying the foundation for one. If his interrogation and detention[1] of the "man in the white shirt" was improper, then, whatever other statute appellant may have offended, it was not 18 U. S. C. A., Sec. 111.

The government defends Sherrill's entry into the cafe, and his subsequent investigation there, as lawful because it was the only "proper and logical thing to do" (Resp. Br. p. 9). We disagree, not because we oppose logic and propriety, but because mere convenience has never been accepted as an excuse for the capricious enforcement of the law (*McDonald v. United States,* 335 U. S. 451, 455.) If it were, few citizens could escape the arbitrary interference with their liberty by police officers.

Respondent complains that appellant offers no other remedy for enforcing the immigration laws. It is not, of course, our duty to do so. But, as was pointed out in appellant's opening brief (pp. 10-16), both Congress and the Attorney General had established adequate law enforcement procedures. It was for Sherrill to operate within their framework; and if, by so doing, the law

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[1]In light of the background leading up to the intercession of the alleged "illegal,"—the elaborate preparations for his commitment and the vowed purpose of Sherrill's entry into the Cafe—it would appear that his interrogation was more than a "detention".

could not be properly enforced, then his recourse was to the Legislature.[2]

However, the Government's claim of helplessness here is not impressive. Sherrill and his superiors knew of their proposed invasion of the La Chaquita Cafe *a week in advance*. There was ample time in which to place the informer's reliability and the facts said to justify an arrest and interrogation of persons in the cafe before an impartial official empowered to issue warrants therefor. Even after the informer left, Sherrill had a telephone with which to call his superiors, and an opportunity to use it. He did not utilize these law enforcement safeguards, not because they were inadequate, nor for lack of time, but because under his construction of the law—

"I may arrest without warrant." [R. 39.]

We submit that such arrogance, though indicative of the manner in which the law was here attempted to be enforced, is inconsistent with the lawful exercise of authority.

II.

The Informer's Identity Was Material to the Issue of Sherrill's Authority, and Hence, the Trial Court's Failure to Order Its Disclosure, or Dismiss, Was Error.

We admire Counsel's artful casting of Sherrill in the role of a kindly, patient investigator, trumpeting his identity for all to hear (Resp. Br. pp. 3, 4, 10, 13). But we fail to find anywhere in the record support for their ad-

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[2]Which is apparently the course pursued by the F.B.I. following the decision in *Coplon v. United States*, 185 F. 2d 629. See appellant's opening brief, page 16.

jectivial description of an alien *furtively* escaping from the cafe while this diligent peace officer was busy discovering who was violating the immigration laws. As we read the record at bar, Sherrill's purported announcement of his authority and purpose was revealed only to those whom he confronted, none of whom appeared to have been near the alleged "illegal." But there is nothing in the evidence indicating that the "man in the white shirt" was or knew of Sherrill's presence in the bar, or his identity, until accosted by him; and that person's attempted departure no more warranted Sherrill's interrogation of him then, than if he had remained seated.

This would seem to dispose of the government's contention that Sherrill had a lawful right to intercept the departing patron, simply because he was leaving, thus rendering the informer's identity immaterial.[3] The fact is that appellant had a right to inquire—at trial—whether Sherrill was pursuing a lawful investigation in the cafe; or simply one of his own concoction (*Roviaro v. United States,* 353 U. S. 53, 61). The issue is one of whether Sherrill had the authority—under all the circumstances—to interrogate, to detain, and to effect an arrest—all without a warrant. These acts are said to be justified here because inspired by information received from an informer. It follows that the latter's identity becomes an important link in the determination of whether Sherrill was lawfully performing his duty (*Roviaro v. United States,* 353 U. S. 53, 61; App. Op. Br. pp. 18-21).

Roviaro cannot be limited, as the government seems to urge, to situations where an informer is a participant in the alleged crime. The Supreme Court has refused to

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[3]See respondent's brief, p. 13.

draw the line there (at p. 62), and even cites with approval decisions rejecting that limitation (at p. 61, footnotes 9 and 10). Indeed, as we have said, the line can only be drawn where fairness and justice will be best served. But it is neither fair nor just for the prosecution to paint an officer with the color of authority, and then hide the paint brush.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be reversed, with directions to enter a judgment of acquittal, or in the alternative, for a new trial.

Respectfully submitted,

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No. 15,389.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR L. DE CASAUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR L. DE CASAUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 1291 and Rule 37, Rules of Criminal Procedure for the District Courts of the United States.

Statutes Involved.

Title 15, Section 714-M, and the due process clause of the Fifth Amendment of the Constitution of the United States:

> "Whoever makes any statement knowing it to be false, or whoever wilfully over values any security for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714-714o of this Title, or under any other Act applicable to the Corporation,

shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both."

Amendment 5 to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case.

The Appellant was convicted of Count 4 of an indictment charging him with making a statement knowing it to be false for the purpose of influencing the action of the Commodity Credit Corporation, an agency of the United States, in that in a conversation with Doyle S. Kennedy, a special agent of the Department of Agriculture, he told Mr. Kennedy that as of October 6, 1954, Casaus, Inc., had exported to the Republic of Mexico, 15,424 cwt. of lima beans which Casaus, Inc., had purchased from the Commodity Credit Corporation when in truth and in fact a much lesser quantity of such beans had actually been exported to the Republic of Mexico. The various counts of the indictment except Counts 2 and 4 were dismissed by the trial judge and the jury acquitted the defendant of Count 2 of the indictment containing purported charges of a statement allegedly made to Special Agent Kennedy in May of 1954.

The case involved a conversation with an agent of the Agricultural Department, Doyle S. Kennedy, who was checking the records of a company for which the defendant worked and involved the question of the shipment of lima beans from the Commodity Credit Corporation into Mexico. The agent spent several days checking books and records and invoices. After the agent had completed his investigation, the matter was apparently closed until the defendant was arrested on the state court charge involving a traffic accident on the freeway and which resulted in considerable publicity. It was almost 11 months later that the present indictment was brought. After the bringing of the indictment the court denied a request for a Bill of Particulars as to the quantity of beans it was claimed by the Government had been actually transported into Mexico. Considerable time was consumed in the trial with the testimony of Doyle S. Kennedy and his check on the books and records of the corporation. He was the lone witness as to the purported statement alleged in the indictment, but nowhere at any time did he testify to the statement as testified in the indictment.

During the course of the trial the defendant demanded the right to inspect and produce government records from the American Customs House in Calexico and San Ysidro in order to show the government records as to the quantity of the beans actually transported by Casaus, Inc., into Mexico, according to American Customs' records. The defense, on the objections of the Government, was refused the right to inspect these records or have them produced in the trial although the Customs House brought their records into the courtroom on the subpoena of the defense.

This is an assigned prejudicial and reversible error.

The defense also requested permission to take depositions in Mexico before a judge of the Mexican Court and to produce this testimony. The court refused this application, also.

The defense produced Luis Orozco, an official of the Mexican Federal Government, to testify regarding Mexican records of beans imported into Mexico and proof that these beans were actually imported. The Court declined in part to receive this evidence and instructed the jury that there was no treaty with Mexico regarding the subject of perjury.

Specification of Errors.

I.

THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT. THE VERDICT IS CONTRARY TO THE LAW AND THE EVIDENCE.

There was no evidence that the defendant ever made a statement as alleged in Count 4 of the indictment to Special Agent Doyle S. Kennedy, "that as of October 6, 1954, Casaus, Inc., exported to the Republic of Mexico 15,424 cwt. of lima beans which Casaus had purchased from the Commodity Credit Corporation."

II.

THERE WAS NO PROOF THAT THE DEFENDANT MADE ANY STATEMENT FOR THE PURPOSE OF OBTAINING MONEY OR PROPERTY OR OTHER THINGS OF VALUE FOR HIMSELF. THERE WAS NO PROOF AS TO THE "LESSER QUANTITY" ASSERTED BY THE GOVERNMENT.

III.

THE RULE OF PERJURY REQUIRING TWO WITNESSES TO ANY ALLEGED FALSE STATEMENT SHOULD APPLY.

There was only one witness to the purported conversation, to wit: Doyle S. Kennedy, the investigator and the defendant to whom he talked who contradicted him.

IV.

THE STATUTE WAS NOT MEANT TO APPLY TO INVESTIGATING OFFICERS.

Section 714 m(a) has been unconstitutionally construed and applied.

V.

THE INDICTMENT AS TO COUNTS 4 FAILS TO STATE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

VI.

THE COURT ERRED IN DENYING APPELLANT THE REQUEST FOR A BILL OF PARTICULARS AS TO THE "MUCH LESSER QUANTITY OF SUCH BEANS" OR THE ACTUAL QUANTITY OF BEANS WHICH THE GOVERNMENT CLAIMS HAD ACTUALLY BEEN EXPORTED TO THE REPUBLIC OF MEXICO.

VII.

THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO HAVE THE GOVERNMENT RECORDS OF THE UNITED STATES CUSTOMS OFFICE PRODUCED AND PRESENTED FOR INSPECTION AND USE IN THE TRIAL. THE DENIAL OF THE RIGHT TO HAVE THOSE DOCUMENTS BY THE GOVERNMENT REQUIRES IT TO "DISMISS THE CASE."

VIII.

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO TAKE DEPOSITIONS IN MEXICO AS REQUESTED BY THE DEFENSE AND PURSUANT TO TITLE 28, SECTION 1781-1782, UNITED STATES CODES.

IX.

THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE INTRODUCTION INTO EVIDENCE OF MEXICAN LANDING RECEIPTS CERTIFIED TO BY THE MEXICAN GOVERNMENT. SAID PROOF WAS AUTHORIZED BY GOVERNMENT REGULATION 212.

X.

THE TRIAL COURT ERRED IN NOT GRANTING A JUDGMENT AS TO COUNT IV OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE AND AT THE CLOSE OF THE ENTIRE CASE. THIS COURT SHOULD DIRECT IT TO ENTER A JUDGMENT OF ACQUITTAL.

XI.

THE TRIAL COURT ERRED IN DENYING A MOTION FOR A NEW TRIAL WHEN IT WAS DISCLOSED ON THE MOTION FOR THE NEW TRIAL THAT THE MARSHAL HAD INADVERTENTLY SENT EXHIBITS TO THE JURY ROOM WHICH HAD NOT BEEN INTRODUCED IN EVIDENCE.

The defendant had requested and the Customs House had produced, the records of the United States Customs Department. but the Court, on objections of the Government, had refused to let these documents be either inspected or produced on the claim that they were privileged and confidential, hence, that although it appears that the Government Agent, Kennedy, was able to see them, the defense was not. Certainly, this is not even-handed justice and it is a denial of fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

I.

The Evidence Is Insufficient to Justify the Verdict. The Verdict Is Contrary to the Law and the Evidence.

There was no evidence that the defendant ever made a statement as alleged in Count 4 of the indictment "to Special Agent Doyle S. Kennedy, that as of October 6, 1954, Casaus, Inc., exported to the Republic of Mexico 15,424 cwt. of lima beans which Casaus had purchased from the Commodity Credit Corporation." The indictment charged the appellant with having made a statement to "Special Agent Doyle S. Kennedy, that as of October 6, 1954, Casaus, Inc., had exported to the Republic of Mexico 15,424 cwt. of lima beans which Casaus had purchased from the Commodity Credit Corporation, when in truth and in fact, as the defendant then and there will know, a much lesser quantity of beans had actually been exported to the Republic of Mexico by Casaus, Inc." Nowhere in Mr. Kennedy's testimony did he ever say that the defendant had made this statement to him. Mr. Kennedy reached a conclusion in his calculations but Mr. Casaus did NOT make the statement to him which is charged in the indictment.

Mr. Kennedy spent considerable time checking the records of Casaus, Inc., and he told Mr. Casaus that he wanted a written statement from him confirming his calculations but he did not receive any statement from Mr. Casaus containing the language which is charged in the indictment.

One cannot be convicted of a statement alleged with specificity in an indictment on a basis that a defendant made some other statement not specified in the indictment.

Such a procedure would be a sure violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States of America. (*Cole v. Arkansas,* 333 U. S. 196, 92 L. Ed. 644 of U. S. Reports.) Mr. Kennedy tried to get from Mr. Casaus a letter which would state in effect that he had made available to Mr. Kennedy all of the records with respect to all of his transactions in lima beans from March 1 up to that date and that the records were complete and accurate, and reflects Mr. Kennedy's findings therein, Reporter's Transcript, page 51 of Volume 3 dated April 19, 1956.

The conversation which Mr. Kennedy related took place with reference to the records was in November of 1954 and Mr. Kennedy conceded that the figures changed from day to day and what he was talking about were records from March 1, 1954 through November 15, 1954. [Rep. Tr. pp. 54 and 55, dated April 19, 1956.] There were numerous discussions between Casaus and Mr. Kennedy relating to Mr. Kennedy's accounting. Mr. Kennedy's accounting was conducted on December 13, 1954 [Rep. Tr. p. 75], and he was asking for a letter for the period from March 1, 1954 to November 15, 1954. [Rep. Tr. p. 76.] At no time did Mr. Casaus ever make the statement alleged in the indictment and at no time did Mr. Kennedy testify that Mr. Casaus made the express statement contained in the indictment. Therefore, the evidence is insufficient to support the verdict and a judgment of acquittal should be granted and ordered.

Where the Government specifies one statement it cannot thereafter convict on an entirely different statement not alleged in any indictment, nor upon mathematical calculations of an investigator of the Governmental Agency.

II.

There Was No Proof That the Defendant Made Any Statement for the Purpose of Obtaining Money or Property or Other Things of Value for Himself. There Was No Proof as to the "Lesser Quantity" Asserted by the Government.

There is no evidence that de Casaus, answering the investigating officer was doing it for the purpose of obtaining money or property or any other thing of value for himself. The lima beans had been fully paid for. There is nothing to show that de Casaus obtained any money or property or other thing of value for himself.

Nor is there any proof of the "lesser quantity" claimed by the government.

III.

The Rule of Perjury Requiring Two Witnesses to Any Alleged False Statement Should Apply.

There was only one witness to the purported conversation, to wit: Doyle S. Kennedy, the investigator and the defendant to whom he talked who contradicted him. The statute was not meant to apply to one person or to statements made to an investigating officer during the course of his inquiries.

The two witness rule, which is so essential in case of perjury, should apply to false statements in matters connected with affairs of the Government. The reason for the two witness rule in perjury cases is equally applicable to prosecution for making "false statements" and where the law exists the rule should apply.

This circuit has held, otherwise in previous decisions but since that time the Supreme Court of the United States has had before it, the case of *Ben Gold v. United States,* No. 137, Oct. Term, U. S. Supreme Court, in

which this point was raised. Although the *Gold* case was reversed on other grounds Justice Tom Clarke, however, urged the court to pass upon this question to whether false statements required and should require two witnesses to the false statements. That court's decision was left open.

IV.

The Statute Was Not Meant to Apply to Investigating Officers.

We do not think that the statute regarding false statements was meant to apply to comments and discussions with investigators, clerks, FBI agents and the persons in that category in the course of investigations.

United States v. Levin, 133 Fed. Supp. 88.

In *People v. Levin*, 133 F. Supp. 88. the court said:

> "[1] If the statute is to be construed as contended for here by the United States, the result would be far-reaching. The age-old conception of the crime of perjury would be gone. 18 U.S.C.A. §1621. Any person who failed to tell the truth to the myriad of government investigators and representatives about any matter, regardless of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury. In this case the defendant could be acquitted of the substantive charge against him and still be convicted of failing to tell the truth in an investigation growing out of that charge, even though he was not under oath. An inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wilfully

falsified his statements, it would be a violation of this statute. It is inconceivable that Congress had any such intent when this portion of the statute was enacted. A literal construction of a statute is not to be resorted to when it would bring about absurd consequences, or flagrant injustices, or produce results not intended by Congress. *Sorrells v. United States*, 287 U. S. 435, 446, 53 S. Ct. 210, 77 L. Ed. 413. The lack of this intention is clearly illustrated from the fact that numerous statutes have been passed which authorize agents of different departments and agencies of the United States to administer oaths to those from whom they are seeking information. 5 U.S.C.A. §93 authorizes an officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud the government or any irregularity or misconduct of any officer or agent of the United States to administer an oath to any witness called to give testimony. This authority was extended in 5 U.S.C.A. §93a. Special authority to administer oaths in the course of an investigation is given in the following statutes:

"5 U.S.C.A. §521 (Officers of Department of Agriculture who are designated by the Secretary); 5 U.S.C.A. §498 (Investigators with the Department of Interior); 7 U.S.C.A. §420 (Secretary of Agriculture or any representative authorized by him in the administration of the Cotton Futures Act, Grain Standards Act, Warehouse Act, and Standard Containers Act); 8 U.S.C. §152, now 8 U.S.C.A. §§1225(a), 1357(b) (Immigration inspectors with respect to aliens); 12 U.S.C.A. §481 (Federal Bank Examiners in examination of federal banks or affiliates thereof); 18 U. S.C.A. §4004 (Wardens, superintendents, and associates wardens of Federal Penal Institutions); 19 U.S.C.A. §1486 (Customs officer,

chief assistants or any employee of the Bureau of Customs designated by the Secretary of the Treasury, or in their absence, postmasters or assistant postmasters in matters involving less than $100); 26 U.S.C.A. §§3632(a) and 3654(a) (Collector, Deputy Collector of Internal Revenue, and agents and officers making investigations); 42 U.S.C.A. §272 (Medical Quarantine Officers of United States)."

V.

The Indictment as to Counts 4 Fails to State an Offense Against the Laws of the United States.

The indictment as to Count 4 merely charges defendant with making a certain false statement and then contains a conclusion of law that the defendant then and there did know that a much lesser quantity had been shipped to the Republic of Mexico. This is a sheer conclusion of the pleader and although indictments have been simplified, they still require facts to be alleged in the indictment under the Fifth Amendment to the Constitution of the United States of America. (*United States v. Debrow,* 346 U. S. 374, 98 L. Ed. 92.)

That an indictment must allege facts we believe is still the law and should apply. Here the statement of "much lesser quantity" was a sheer conclusion of the pleader. At the time of the indictment such facts were not presented to the Grand Jury and on its face, the indictment, therefore, fails to state an offense against the laws of the United States.

United States v. Williams, 203 F. 2d 572;
United States v. Lattimore, 112 Fed. Supp. 507;
United States v. Lattimore, 215 F. 2d 847.

VI.

The Court Erred in Denying Appellant the Request for a Bill of Particulars as to the "Much Lesser Quantity of Such Beans" or the Actual Quantity of Beans Which the Government Claims Had Actually Been Exported to the Republic of Mexico.

The defendant requested the information by Bill of Particulars as to what quantity of beans the Government claims had been shipped into Mexico. The request was denied. This was essential to meet the charges alleged in the indictment. It was a denial of a fundamental right, and would enable the defendant to know what he has to meet and meet the exact charge, Rule 7C, Rules of Criminal Procedure for District Courts of United States.

United States v. Smith, 16 F. R. D. 372;

United States v. Clark, 10 F. R. D. 622.

VII.

The Court Erred in Refusing to Allow the Defendant to Have the Government Records of the United States Customs Office Produced and Presented for Inspection and Use in the Trial. The Denial of the Right to Have Those Documents by the Government Requires It to "Dismiss the Case."

In the course of trial the major issue before the court was the number of lima beans shipped into Mexico by Casaus, Inc., and to show that a quantity equal or greater than the number alleged in the indictment had been shipped into Mexico to prove all of the shipments which had been made by Casaus, Inc. The defendant subpoenaed the U. S. Customs Office to bring its records into court.

The customs office produced the records in court but failed to testify regarding them on a claim of the Government that these records were confidential and privileged and, therefore, should not be permitted to be inspected by the defense for the purpose of meeting the charges. The defenses request was specific as to certain dates and certain months. The Government having elected to keep the records confidential rather than disclose them, elected to dismiss the case. *Jencks v. United States,* No. 23 of Decisions of the United States Supreme Court, announced June 3, 1957. Justice Brennan speaking for the court in that case said "We hold that the criminal action *must be dismissed when the Government,* on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro v. United States,* 353 U. S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." We, therefore, on the basis of the *Jenks* case ask the Court to reverse the judgment and order the case dismissed.

VIII.

The Court Erred in Refusing to Allow the Defendant to Take Depositions in Mexico, as Requested by Defense Pursuant to Title 28, Section 1781 of the United States Codes.

Title 28. §1781, provides as follows:

> "Whenever a court of the United States issues letters rogatory on a commission to take a deposition in a foreign country, the foreign court or officer executing the same, may make return thereof to the nearest United States Minister or Consul, who shall endorse thereon the place and date of his receipt, and any change in the condition of the deposition, and transmit it to the clerk of the issuing court in the manner in which his official dispatches are transmitted to the United States Government."

> " 'Letters rogatory' are the medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts . . . to assist the administration of justice. . . ." (*The Signe,* 37 F. Supp. 819.)

There is no reason to believe that the testimony thus taken would be untrue nor was it proper for the court to leave the jury with such an inference by giving it an instruction that there was no extradition treaty for perjury.

The court should have granted judgment of acquittal for the reasons hereinabove set out and we request this court to direct the court below to grant a judgment of acquittal. This was the procedure recently adopted by the United States Supreme Court in the case of *Oletha Yates, et al. v. United States,* in the session of June 17, 1957.

IX.

The Trial Court Erred in Refusing to Permit the Introduction Into Evidence of Mexican Landing Receipts Certified to by the Mexican Government. Said Proof Was Authorized by Government Regulation 212.

The court refused to allow documents authenticated in Mexico to be introduced in evidence although they were certified by the American Consul.

During the deliberations of the jury, the jury sent for the invoice books which had been referred to in the trial but not introduced into evidence. They were received by the jury, however, and discovery of this fact occurred when the trial judgment made it known himself during the hearing on a motion for a new trial and put the Deputy Marshal on the stand, who had delivered these documents to the jury. The court, however, held that that it was not prejudicial and denied the motion for a new trial.

The trial court erred in failing to admit into evidence the Mexican landing receipts which were certified by the American Consul in Mexico as correct and which went to establish the innocence of the defendant.

Wherefore, Appellant prays for reversal of the judgment below and an order to the court to dismiss the indictment.

X.

The Trial Court Erred in Not Granting a Judgment as to Count IV of Acquittal at the Close of the Government's Case and at the Close of the Entire Case. This Court Should Direct It to Enter a Judgment of Acquittal.

At the close of the government's case and at the close of defendant's case motions were made for judgment of acquittal and denied. In view of the total lack of evidence the court should have granted the motion. Since the evidence is entirely absent to sustain the judgment this court is requested to direct the court below to enter judgment of acquittal.

XI.

The Trial Court Erred in Denying a Motion for a New Trial When It Was Disclosed on the Motion for the New Trial That the Marshal Had Inadvertently Sent Exhibits to the Jury Room Which Had Not Been Introduced in Evidence.

These were not admitted in evidence and therefore they were improperly before the jury.

Wherefore appellant prays for reversal of the judgment and direction to the court below to enter judgment of acquittal.

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Attorney for Appellant Victor L. de Casaus.

No. 15389

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR L. DE CASAUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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IN THE

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APPELLEE'S BRIEF.

Introductory Note.

The Reporter's Transcript was not all prepared at one time, a portion of it having been made up during the trial. Thus, the Transcript is not consecutively numbered, nor is the Transcript for a single day necessarily all in a single volume. To avoid confusion both the date and the page are cited in this Brief to identify the portion of the Transcript referred to, except where the testimony of Special Agent Doyle S. Kennedy is involved, which was transcribed separately, and which is indicated by a capital K, followed by the date and page. The Government hopes in this manner to facilitate the Court's consideration of the Record on Appeal.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a judgment after conviction following trial by jury under Title 15, Section 714(m). Jurisdiction is conferred by virtue of the provisions of Title 28, Section 1291 and Rules 37 and 39, Federal Rules of Criminal Procedure.

II.
STATEMENT OF THE CASE.

A. Summary of the Government's Case.

In the Indictment the Grand Jury alleged in effect that appellant bought surplus lima beans from the Commodity Credit Corp. (C.C.C.) for export, that he did not export them, but that instead he sold them domestically contrary to his contract to export, and that appellant falsely stated to a Government agent that he had exported all of the surplus limas.

To prove these allegations the Government offered circumstantial evidence as follows:

(a) That appellant presented as proof of export, 11 Mexican "Landing Receipts" which were false and fictitious documents;

(b) That the files of Shipper Export Declarations (S.E.D.), required to be filed with U. S. Customs for subject exports, were checked by American custom officials and no corresponding documents to the 11 Mexican "Landing Receipts" could be located;

(c) That appellant sent to Mexico a truck load and caused the driver to present to American Customs officials at San Ysidro, California, a Shippers Export Decla-

ration representing that the load contained 350 cwt. of limas, but Government inspection of that load revealed only 20 cwt. of limas so placed as to hide the rest of the load, the balance being other produce. This raised an inference that any or all of the S.E.D.'s supplied by appellant as proofs of export might contain similar fraudulent and false claims as to the actual produce exported;

(d) That up to October 6, 1954, appellant sold 13,656 cwt. of lima beans in the United States domestic market, out of a total supply of 23,164 cwt. giving rise to an inference that all of the 15,417 cwt, of surplus limas purchased from the C.C.C. could not have been exported;

(e) That false invoices were included by appellant in the corporation's records during an examination thereof by Special Agent Doyle S. Kennedy of the Department of Agriculture, which invoices purported to show that domestic lima transactions were transactions in some other commodity, *e.g.,* black-eyed peas, etc., for the purpose of concealing the fact that the surplus limas had been sold domestically.

B. Facts.

Appellant Victor L. De Casaus was the General Manager of Casaus Inc. [K 4/17/56, p. 26], a family corporation [5/1/56, p. 118], which also operated under fictitious firm names as Casaus Bros. and the New Mexico Bean Co. [4/17/56, pp. 511, 543-545] and had formerly been a partnership [4/17/56, p. 541]. He admitted that he was the one responsible for dealings with the Government [K 4/17/56, p. 26]. In such capacity he purchased quantities of lima beans from the Commodity Credit Corporation [5/1/56, pp. 101, 104-

106, 110-111], under an agreement that they would not be sold on the domestic market, but would be exported, and Casaus would furnish the C.C.C. satisfactory proof of exports [Exs. 1, 4]. The purchase price was low, but the contract provided that in the event the beans were not exported, the purchaser would pay the domestic price instead of the reduced price. Contrary to said agreement appellant sold the lima beans on the domestic market [5/1/56, pp. 119-120, 124, 126], at a price slightly below then current market prices. [4/13/56, pp. 333-334]. Appellant then furnished the C.C.C. with false proofs of exports [Exs. 40, 41] in order to avoid paying the Government the higher price for domestic sale of limas required by the contract. [Exs. 1, 4].

Information had come to the Department of Agriculture that export lima beans were reaching the domestic market [K 4/19/56, p. 93]. The Department assigned Special Agent Doyle S. Kennedy, Compliance and Investigation Branch, Commodity Stabilization Service, to investigate the source of these beans [K 4/11/56, p. 4; K 4/17/56, p. 22]. His investigation led him to appellant [K 4/17/56, p. 23; K 4/20/56, pp. 25-27]. The Casaus investigation had two phases. The first phase began in early May 1954 [K 4/17/56, p. 23], and concluded July 20, 1954 [K 4/18/56, pp. 53-54]. The second phase began on November 1, 1954 [K 4/18/56, p. 94] and concluded December 13, 1954 [K 4/19/56, p. 75].

During the first phase appellant presented to the Department of Agriculture certain documents, which he claimed were proofs of export in that he alleged them to be Mexican "Landing Receipts" showing import into Mexico of lima beans from the United States [Ex. 39; quoted [K 4/18/56, pp. 88-93; Ex. 41]. In fact, 11 of

these were false documents [Exs. 40, 41] according to the testimony of Jimeniz, a customs official of the Republic of Mexico who was sent by his Government to be a witness [4/11/56, pp. 147, 155, 158, 161-167]. Also Johnny Harmison, a truck driver and employee of appellant testified he took a truck load of merchandise to the Mexican border from Los Angeles on July 17, 1954 [4/13/56, pp. 407-417; Ex. 112]. The documents he presented to U. S. Customs represented that he had 350 cwt. of lima beans aboard [4/17/56, p. 472; Ex. 112]. Although the practice of customs was to accept the declaration of shippers regarding the contents of load, because of the investigation of Casaus then being conducted this particular load was checked. The van-type truck had 20 cwt. of limas visible at the rear, but inspection showed other products, not limas, constituted the balance of the load [4/17/56, pp. 471-472].

Most of the alleged export shipments which were covered by false "Landing Receipts" [Exs. 40, 41] were purportedly made to a firm in Mexico, Almacenes Distributores Mercantiles Las Casas. Appellant's own letter showed that his brother Alfonso was then an official of the Mexican corporation [4/18/56, pp. 89-93; Ex. 39]. This same brother had participated in an attempt to prevent the Government from obtaining necessary Casaus Inc. records for the trial [4/11/56, pp. 114-124, 136-141; 4/12/56, pp. 223-233]. The Government witnesses Simmons and Fawver testified to their search of American customs records in an attempt to find American export documents corresponding to the Mexican "Landing Receipts," with negative results [4/13/56, pp. 362, 365, 379, 381].

In the second phase of the investigation Kennedy found that the false invoices had been inserted in the appellant's records, the purport of which was that products other than lima beans were sold to various domestic merchants when in fact the limas were sold [4/18/56, pp. 109, 115-128; 4/19/56, pp. 8-9]. The Government produced the domestic purchasers of the lima beans as witnesses. (See testimony of Cleo H. Barth, Marcus Rosenberg, Rosario Provenzano, Benjamin Francis Harris, Mary Hardage Oxford.) The figures showed Casaus Inc. had an inventory on February 28, 1954 of 7,004 cwt. [Ex. 115A], and purchases from other than Government sources of 337 cwt. [Exs. 8, 9] during the period March 1, 1954 to October 6, 1954. Purchases from the Government during this same period amounted to 15,417 cwt. [Ex. 124]. Domestic sales during this time were 13,656 cwt. [Exs. 10-23, 46-50]. Simple mathematics indicates that this left only 9,102 cwt. available for export, *if in fact appellant did export any limas,* against a required export of 15,417 cwt., a shortage of 6,315 cwt.

On November 1, 1954, when Kennedy resumed his contact with appellant in connection with the investigation, the two gentlemen had a conversation. Kennedy related it in part as follows [K 4/18/56, p. 102]:

> "With respect to his lima bean purchases from the C.C.C., he (Appellant) stated that he had received *all lima beans under all of the transactions* from the C.C.C. and *that he had exported them all* and he drew up a work sheet showing the purchases from C.C.C. which he stated was complete." [Ex. 124; emphasis supplied.]

Kennedy related further [4/18/56, p. 104]:

"A. Mr. Casaus said that all of these beans had been exported at this time.

Q. Indicating? A. 15,417 bags is the total, and a fraction.

Q. Continue then with your conversation on November 1, 1954."

Prior to trial, appellant made a Motion for a Bill of Particulars [Clk. Tr. p. 32]. The Court, after hearing the Motion on January 16, 1956, ordered the Government to make available to appellant for inspection certain described documents upon which it intended to rely. Notice of the entry of this Order was given to appellant [Clk. Tr. p. 47]. Prior to trial the required documents were photostated and given appellant pursuant to arrangements between counsel. No further request was made regarding the Bill of Particulars although the denial, after requiring the Government to permit inspection, was without prejudice [Clk. Tr. p. 47].

A demand was made by appellant during trial to inspect the voluminous customs records [4/17/56, p. 464]. This followed testimony on April 13, 1956 by Fawver and Simmons, United States Customs officials, that they had searched the customs records at Calexico and San Ysidro respectively, for Shippers Export Declarations Form No. 7525-V, a required export document, for shipments corresponding to the false Mexican "Landing Receipts" [Exs. 40, 41] and that they did not find any corresponding documents. The agents produced the records, but, pur-

suant to Treasury regulations requiring them to do so, they respectfully declined to permit a general search by appellant based upon the confidential character of the records and the Government's consequent claim of privilege. In this regard, the following portions of the transcript are pertinent [4/18/56, pp. 577-578]:

> "The Court: Anyhow, the Motion for the Production of Documents has been complied with, they are produced, that is they are here; but the Motion for Inspection of all these documents as heretofore made between certain dates, as I recall it was about the first of March and the end of November. . . .
>
> "Mr. Dunn: That is right.
>
> "The Court: (resuming discussion) . . . is denied. If however, you desire inspection of specified documents or any documents in those records which relate to the Casaus Bros., Casaus, Inc., New Mexico Bean Co., Almacenes, or whoever your purchaser might be in Mexico, that you claim, or whoever your broker might be on the dates mentioned, I will order them to produce those particular documents for your inspection."

[4/18/56, p. 622]:

> "The Court: Now coming to your further motion to produce as to the other two Counts, I do not think you are entitled to any sweeping discovery. I do think that you are entitled to have an inspection of any Forms 7525-V which show an exportation by Casaus, or Casaus Bros., or the New Mexico Bean Co. on or about the date shown on the attachments to Exhibits 39, 42 and 43, and from the specific consignor and to specific consignees named therein and not otherwise.

"Now I can formalize that as to Exhibits 41 and 43 but I have not done it as to Exhibit 42. I do not know that you want these that are involved now in 42 and 43, Mr. Lavine, because the Government says they are not challenging the correctness of those.

"Mr. Lavine: No I don't."

[4/18/56, p. 626]:

"The Court: Well, in any event, the Motion is denied. It is too broad and all inclusive."

The Shippers Export Declarations 7525-V were documents filed by or on behalf of appellant's company, but appellant refused to specify the documents which he claimed he had filed and upon which he intended to rely. Without such specification, the Court denied appellant's Motion for inspection as indicated above because the demand was too broad. The Court indicated a properly specific Motion would be granted, as is indicated in the foregoing quotations, but one was not made.

The question of taking certain depositions in Mexico was raised by Motion of appellant during the trial [4/14/56, pp. 436, 455, 457]. The Government objected that no proper notice of such Motion was given and that appellant was not surprised because he had had notice of the Government's claims with respect to the evidence sought since July 20, 1954. The Court sustained these objections [4/14/56, pp. 445-447, 452, 457.]

Appellant offered certain documents, Exhibits EB and FB during trial, purporting to be copies of Shippers Export Declarations [5/3/56, p. 42]. The Government

objected to the offer based on a lack of foundation in that these documents were not shown to have any connection with Casaus Inc. nor any of the other companies of appellant, nor with appellant nor with *lima bean* transactions. The objection was sustained [5/3/56, p. 42]. The witness testified only that they were documents which he found in the files of the Mexican corporation [5/3/56, pp. 40-41]. He was not the accountant for the corporation [5/3/56, p. 55].

While the jury was deliberating they requested the exhibits in the case [5/14/56, pp. 774-775]. By mistake the bailiff took appellant's J, K, and L, which had not been admitted into evidence, to the jury room [5/14/56, p. 775]. These were Casaus Inc. invoices of food products from which pertinent invoices had been removed and introduced into evidence. Appellant had offered J, K and L in evidence and the Government objected to them as being irrelevant and immaterial since not shown to be connected with the bean transactions. The objection was sustained [K 4/23/56, pp. 6-7; 4/25/56, p. 65]. When appellant learned after trial of the delivery of said exhibits to the jury, he included such delivery as one of the grounds in his Motion for New Trial [5/14/56, p, 784]. The Court denied the Motion in this regard on the ground that the error, if any, was harmless [6/11/56, p. 788].

III.
ARGUMENT.

A. Ample Evidence Supported the Jury's Verdict.

A reading of the entire record clearly indicates that appellant was engaged in a *blatant fraud* on the agricultural price support program of the United States, which program was being carried out through the agency of the Commodity Credit Corporation (C.C.C.). He purchased lima beans at a price far below the market from the C.C.C. promising to export. He agreed with the C.C.C. that in the event he did not export the limas he would pay to C.C.C. the going domestic price. He did not export, but sold the beans domestically. To avoid the contractual obligations he presented forged and false documents to the C.C.C., and the government investigator,, and thereafter tried to mislead the investigator by putting false invoices in his files. The latter were used in an attempt to cover up the domestic sale of the limas. He attempted to obtain false proofs of export by sending trucks to Mexico with S.E.D.'s declaring that the loads were lima beans, when in fact other commodities comprised the load (the Harmison load).

Appellant's real complaint seems to be that he claims that the Government is required to prove that he used the exact words set forth in the Indictment. It is interesting to note that no quotation marks are used in Count IV of the Indictment, of which appellant stands convicted, and thus it does not purport to be an exact statement by defendant.

Kennedy, the investigator, testified that he began the second phase of his investigation on November 1, 1954. He asked appellant in a conversation that day "whether

or not he had received delivery of all of the beans contracted for, and he stated he had" [K 4/19/56, p. 61]. Deliveries of these beans concluded as of October 6, 1954 [Ex. 124] according to a work sheet prepared by appellant [K 4/19/56, p. 61]. This showed appellant had contracted for 15,539 cwt. of C.C.C. limas and had received 15,417.21 cwt. net weight.

With this information before Kennedy and appellant, Kennedy stated the following conversation took place [K 4/18/56, p. 102]:

> "With respect to his (appellant's) lima bean purchases from the C.C.C., he stated that he had received all lima beans under all of the transactions from the C.C.C. and that *he had exported them all,* and he drew up a work sheet showing the purchases from C.C.C. which he stated was complete." (Emphasis supplied.)

[K 4/18/56, p. 104]:

> "Q. But with respect to any conversation you had at that time, did you have further discussion with Casaus? A. Mr. Casaus said that all of these beans had been exported at this time.
>
> "Q. Indicating? A. 15,417 bags is the total, and a fraction.
>
> "Q. Continue then with your conversation on November 1, 1954."

The foregoing, taken in context, is certainly equivalent to the allegation of Count IV of the Indictment, that as of October 6, 1954, Casaus Inc. had exported to the Republic of Mexico, 15,424 cwt. of lima beans which Casaus purchased from the C.C.C.

The Grand Jury had merely extracted the specifics from the evidence which appellant and Kennedy had before

them at the November 1, 1954 conversation, so that appellant would be advised of the matter with which he was being charged in the Indictment. Appellant made the same contentions at the trial, that he had exported all the C.C.C. limas to Mexico [4/30/56, p. 40]. The Trial Jury did not believe him, they did believe he had made the statement to Kennedy contained in Count IV of the Indictment.

It is not incumbent upon the prosecution to prove a false statement in the *exact* language of the indictment.

> *Stevens v. United States* (6 Cir. 1953), 206 F. 2d 64, 66-67.

> "Nor was it necessary for the Government to prove that the alleged discrepancy between the cost data statement and the books of the School was in the exact amount as charged by the indictment. The cost data statement was a false statement if it differed materially from the amount shown by the books, even though the difference was not the exact difference charged, and such a showing did not violate the general rule that allegations and proof must correspond in order not to constitute a variance. The rule is based upon the obvious requirements:
>
> (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and
>
> (2) that he may be protected against another prosecution for the same offense.
>
> *Berger v. United States,* 295 U. S. 78, 82, 55 S. Ct. 629, 79 L. Ed. 1314." (Citing other cases.)

B. Appellant Made the False Statement for the Purpose of Influencing the Action of the C.C.C.

Appellant alleges on page 9 of his Opening Brief (under Point II) that the lima beans had been fully paid for. This ignores facts which were before the jury [Exs. 1, 4]. The purchases were made subject to an obligation to pay the differential between the special "export" price and the market price [Exs. 1, 4]. Since the jury had to find a substantial quantity of the beans were not exported in order to find appellant guilty, it follows that those not exported were not fully paid for. There was no evidence that Casaus paid such difference.

It is also arguable that appellant's actions did tend to obtain money, property or something of value for himself, given his position as General Manager of the Corporation. He was the "boss" according to Harmison, a company employee [4/13/56, p. 411].

However, it is not necessary for the prosecution to rely on the foregoing alone, because the statute has another alternative provision:

> "Whoever makes *any statement* knowing it to be false, . . . *for the purpose of influencing in any way the action of the Corporation,* or for the purpose of obtaining for himself or another, money, property or anything of value, . . ." (Emphasis supplied.)
>
> Title 15, Sec. 714m(a), U. S. Code.

There cannot be room for doubt that the false statement, and all the attendant fraudulent conduct of appellant, was designed to influence the action of the C.C.C., to wit: to refrain from collection of the additional money to which the C.C.C. became entitled by virtue of the domestic sale of the lima beans.

Count IV of the Indictment alleges the two portions of the statutory language in the conjunctive. The statute is in the disjunctive. This is recognized as proper pleading.

> "As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to connect the various allegations in the accusing pleading with conjunctive term 'and' and not with the word 'or.' 42 C. J. S., Indictments and Informations, §101, quoted in *Price v. United States* (5 Cir.) 150 F. 2d 283, cert. den., 326 U. S. 789, 66 S. Ct. 473, 90 L. Ed. 479."
>
> *Heflin v. United States,* 223 F. 2d 371, 373 (5 Cir., 1955).

The Government is only required to prove one or the other purpose.

> "When several acts specified in the statute are committed by the same person, they may be coupled in one count as together constituting one offense although a disjunctive word is used in the statute, and proof of any one of the acts joined in the conjunctive is sufficient to support a verdict of guilty. So where as here, the indictment charged that the defendant did lawfully remove, deposit, and conceal, it was enough to prove any one."
>
> *Crain v. United States,* 162 U. S. 625, 634-636, 16 S. Ct. 952, 40 L. Ed. 1097;
>
> *Heflin v. United States,* 223 F. 2d 371, 373-374 (5 Cir., 1955);
>
> *Shepard v. United States,* 236 Fed. 73, 81-82 (9 Cir., 1916).

C. A Substantially Lesser Quantity of Limas Was Exported.

Also in Point II of the Argument in the Appellant's Opening Brief (p. 9), he asserts there is no proof of "the lesser quantity claimed by the Government." This ludicrous contention deserves little attention. Here is a person who fraudulently conceals his failure to export. He now says in effect, "you have to specifically tell me exactly how much I cheated you, or my conviction should not stand."

As far as the Government is concerned we proved that 20 cwt. of limas went over the border (on the "Harmison load" which was fraudulently claimed to contain 350 cwt. of limas). Although for purposes of trial, while we had to accept proofs of export which were on file which we could not prove to be false, we did establish that 6,315 cwt. (631,500 lbs.) of limas, could not have been exported. Considering the implications naturally arising from the "Harmison load" it is very likely that large additional quantities were not exported, but that a proof of export was obtained. Suffice to say a substantial quantity was not exported, enough to make it a matter of which the criminal courts should take cognizance. This is all that the law requires.

D. The Perjury "Two-Witness" Rule Does Not Apply. The "Gold" Case Cited by Appellant Does Not Hold Differently, Merely Contains the Suggestion of a Single Justice of the United States Supreme Court That the Question Should Be Considered.

The next point of Appellant's Brief would urge this Court to apply the perjury "two witness" rule to a case based upon a specific false statement statute (714m(a), Title 15, U. S. Code). His candor that such is not the law in this Circuit is admirable. But any close reading of the United States Supreme Court perjury cases clearly indicates that the two witness rule is not a hard and fast one. The testimony of a single witness is sufficient when his testimony is corroborated by relevant circumstances.

Weiler v. United States, 323 U. S. 606, 610-611;

Hammer v. United States, 271 U. S. 620;

Vetterli v. United States, 198 F. 2d 291 (9 Cir., 1952), cert. granted on other grounds, 344 U. S. 872.

"This court refused to apply the perjury corroboration rule to a prosecution under Section 1001 in *Todorow v. United States* (9 Cir.), 173 F. 2d 439; cert. den. 1949, 337 U. S. 925, 69 S. Ct. 1169, 93 L. Ed. 1733."

* * * * * * * *

"The question is a close one, but the reasons behind the perjury rule do not seem applicable."

Fisher v. United States, 231 F. 2d 99, 105, 106 (9 Cir., 1956).

Here, first of all, we do not have a perjury case. Assuming, *arguendo,* that perjury rules should be applied, there is ample corroborating evidence in this case.

(a) Appellant himself testified [4/30/56, p. 40], on direct examination by his counsel as follows:

> "Q. (By Mr. Lavine): After processing those beans did you thereafter export all of those beans that were secured from the Commodity Credit Corp. to Mexico? A. Yes sir."

This is the same contention, Kennedy stated in his testimony, that appellant made to him on November 1, 1954. Also, Government Exhibit 39 [quoted in K 4/18/56, pp. 88-93], a letter signed by appellant, makes the same representation as of an earlier date. Of particular interest is the following portion of that Exhibit [K 4/18/56, pp. 88-89]:

"These Landing Receipts are all for the beans in question which were exported to Mexico through Mexicali. . . ."

And later [K 4/18/56, pp. 89-90] "If the Department is interested, Alfonso G. DeCasaus, and the corporation of which he is an officer, will submit sworn statements as to the disposition of all of the beans imported into Mexico by said company after their arrival in Mexico, so that there can be no doubt that the same were received. This accounting might be of some assistance, but the time which the undersigned had to spend in Mexico was too limited to permit obtaining the same in view of the urgency of getting this information to you, before your report was forwarded to the Commodity Credit Corporation."

There being ample corroborating evidence, two witnesses to the statements should not be required even if the Court were inclined to apply perjury standards to this prosecution under the C.C.C. Act.

E. The Statute Involved Applies to Statements Made to Department of Agriculture Investigators.

Appellant's Point IV is his conclusion that the statute here involved was not meant to apply to an investigator. As authority he cites a decision of the United States District Court for Colorado. It is not persuasive. No other authority is given.

The Statute says "Whoever" which seems clear and sufficiently understandable. In this case the evidence shows that Casaus Inc., for whom appellant worked, was required by its contract to make records regarding its transactions with C.C.C. available to representatives of the C.C.C. Kennedy, to whom the false statement was made, was designated to inspect those records and make an investigation. [K 4/11/56, p. 4; K 4/17/56, pp. 22-23.]

Certainly if the Government is going to be able to protect itself from avaricious businessmen, in its legally authorized business affairs, it should have the power to make it a crime to make false statements in such transactions to representatives of the Government. Even in such a narrow construction of the statute, this case would qualify. To whom would the "Whoever" of the statute apply if not to the duly authorized and appointed investigator of the Government? Neither reason nor logic gives support to this contention of the appellant. Rather it supports the view that, if "Whoever" is to be restricted in any regard, it should at all events apply

to the duly authorized representative of the Department having the dealings which are the subject of the false statement.

F. Count IV of Indictment States an Offense Against the Laws of the United States.

Appellant's Point V alleges that Count IV of the Indictment fails to state an offense against the laws of the United States. It is elementary that since the advent of the Federal Rules of Criminal Procedure it is generally sufficient to plead an offense in general terms in the language of the statute supplying in each count the specific information applicable to the particular transaction described therein.

Cohen v. United States (6 Cir. 1949), 178 F. 2d 588, 591, cert. den. 359 U. S. 920;

Sutton v. United States (5 Cir. 1946), 157 F. 2d 661;

Mellor v. United States (8 Cir. 1946), 160 F. 2d 757, cert. den. 331 U. S. 858;

Rule 7c, Federal Rules of Criminal Procedure.

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."
>
> *United States v. Debrow,* 346 U. S. 374, 376.

This has been done in Count IV. There was added the language to which appellant objects to the effect that the

statement was false, as appellant well knew, in that a "much lesser quantity" (than that purchased) was in fact exported to Mexico. This language appellant tags as a "sheer conclusion of the pleader". It is, in essence, a statement of ultimate fact. It meets the test of advising the defendant sufficiently of the nature of the offense so that he can prepare his defense and avoid surprise. He knew that the Government was going to contend that a substantial number of his claimed export shipments were not actually made. His defensive problem was then crystallized into supporting his contention that they were exported.

On the other side of the picture, the Grand Jury was faced with evidence that put in doubt whether any lima beans were exported. All they knew was that the large quantity of claimed exports had not been made. Unless a substantial quantity of beans had not been exported, there would be no indication that a crime had been committed. Thus, they had to find the failure to export a substantial quantity in order to return the Indictment. That was the ultimate fact, or a conclusion of fact, but not a conclusion of law by any stretch of the imagination.

In his Point V, appellant also contends "at the time of the Indictment such facts were not presented to the Grand Jury . . ." No Grand Jury transcript has been filed with the Clerk, nor is one a part of this record. The proceedings of the Grand Jury were secret. Appellant does not tell us how he came by such information, if it is the fact, nor does he show us where the record supports his said contention. Appellee asserts that it has no basis in fact and that no transcript of such proceedings has ever been made.

G. There Was Not a Final Denial of Appellant's Request for a Bill of Particulars.

So that appellant will not have further doubt: *The Government does not now, nor has it on any occasion pertinent to this proceeding, claimed that appellant or his corporation exported any lima beans whatsoever."* On the contrary, the contention is that any export of limas was negligible. Because of appellant's fraudulent activities, however, the Government only succeeded in proving definitely that 631,500 lbs. were not exported. By inference from the evidence presented the trier of fact could have found the Government's contention was entirely true and that none were exported.

With regard to appellant's argument in his Point VI, that his request for a Bill of Particulars was denied, the Court is respectfully directed to the following facts:

On January 17, 1956, the United States Attorney caused to be served by mail on appellant's counsel of record a Notice of Entry of Order on Bill of Particulars [Clk. Tr. p. 47], containing a copy of the Order on the Bill of Particulars entered by the District Court for the Southern District of California, Central Division on January 16, 1956 [Clk. Tr. p. 48]. In essence, the appellant's demand for a Bill of Particulars was responded to by the Court's granting an order to inspect and copy documents, and in all other respects the Motion was denied *without prejudice* [Clk. Tr. pp. 48-49]. The record is devoid of any further pre-trial renewal of the Motion on appellant's part, although the Court's Order left such a course open in the event the granted inspection of the documents did not satisfy him.

In any event, the granting or denial of a Bill of Particulars is a matter entirely within the discretion of the

Trial Court, and is only ground for reversal when an abuse of discretion is shown.

Himmelfarb v. United States (9th Cir., 1949), 175 F. 2d 924, cert. den. 338 U. S. 860;

Wong Tai v. United States, 273 U. S. 77;

Kobey v. United States, 208 F. 2d 583 (9 Cir., 1953).

No evidence or showing of such abuse is made other than the bare allegation in appellant's Brief that his request was "essential".

H. Denial of Appellant's Request to Fish Through Voluminous Government Customs Records Was Not Error.

The rule is well established that a certified and properly authenticated document from the files of the U. S. Government is sufficient evidence, without the necessity of appearance of any witness, of an official record, or *the absence thereof.*

Rule 27 of the Federal Rules of Criminal Procedure provides:

> "An official record or an entry therein *or the lack of such a record or entry* may be proved in the same manner as in civil actions." (Emphasis added.)

Rule 44 of the Federal Rules of Civil Procedure provides in part as follows:

> "(b) A written statement signed by an officer having the custody of an official record, or by his deputy, that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contained no such record or entry."

The prosecution, rather than following that procedure, elected to bring in Customs officials [Witnesses Fawver, Simmons, 4/13/56] to testify to their search of customs records. This was corroborating evidence to the testimony of customs official of Mexico regarding the falsity of the 11 Mexican "Landing Receipts" [Witness Jiminez 4/11/56, 4/12/56; Ex. 40]. The intention of the Government was to show (1) that the Mexican documents were false, (2) that there was no corresponding document on the American side, and (3) that this was part of a pattern of deception worked upon the C.C.C. by appellant. These contentions were inferentially adopted by the jury in its finding of guilty.

The action of the Government in bringing in the witnesses gave the defense an opportunity to cross-examine as to their search, so that the appellant could be satisfied it was a fair search. Nevertheless, the defense made a demand that it be permitted to fish through the voluminous files of Shippers Export Declarations Form 7525-V [4/20/56, p. 567], to see if they couldn't find something they could claim as a Casaus export of limas. These are documents required to be filed by the shipper, and made up by him or his agents in the regular course of business. Thus appellant, or Casaus Inc., would normally have a copy of such document in his own files. It would have been a very simple matter for appellant to search his files, get the date and the number of the documents he wished to request, and point them out to the Customs officials or demand the specific documents, if *any such documents in fact existed.* The Court invited appellant to specify and indicated it would grant the Motion to Inspect to that extent. Appellant says he gave certain dates and months, but he was requesting a general search of the records for those times as the record indicates. [4/20/56, pp.

566-567.] Appellant never did respond to the Court's invitation to specify the documents which he had in mind. [4/18/56, pp. 577-578]:

"The Court: Anyhow, the Motion for the production of documents has been complied with, they are produced, that is, they are here; but the Motion for Inspection of all these documents as heretofore made between certain dates, as I recall it was about the first of March and the end of November . . .

"Mr. Dunn: That is right.

"The Court: (resuming discussion) It is denied. If however you desire inspection of specified documents, or any documents in those records which relate to the Casaus Bros., Casaus Inc., New Mexico Bean Company, Almacenes, or whoever your purchaser might be in Mexico, that you claim, or whoever your broker might be on the dates mentioned, I will order them to produce those *particular documents* for your inspection." (Emphasis supplied.)

[4/18/56, p. 622]:

"The Court: Now coming to your further Motion to Produce as to the other two Counts, I do not think you are entitled to any sweeping discovery. I do think that you are entitled to have an inspection of any forms 7525-V which show an exportation by Casaus or Casaus Bros., or the New Mexico Bean Co., on or about the date shown on the attachments to Exhibits 39, 42 and 43, and from the specific consignor and to specific consignees named therein and not otherwise.

"Now I can formalize that as to Exhibits 41 and 43, but I have not done it as to Exhibit 42. I do not know that you want these that are involved now in 42 and 43 Mr. Lavine, because the Government says they are not challenging the correctness of those.

"Mr. Lavine: No I don't."

[4/18/56, p. 626]

"The Court: Well, in any event, the Motion is denied. It is too broad and all inclusive."

There is an obvious advantage to an exporter to go through Customs records and see what his competition is shipping and to whom. That is one of the reasons the documents are classified and not made available generally. Based on the recent *Jencks* decision, United States Supreme Court, June 3, 1957, ... U. S. ....., appellant contends he is entitled to a dismissal because the Government claimed its privilege. In *Jencks,* the defense showed there were reports made which related to matters touched upon by the witnesses' testimony. The defendant was held to be entitled to examine these reports to assist in his cross-examination of the witnesses. The facts to which the witnesses testified in *Jencks* had occurred several years before. In the instant case, there were no such reports, merely the absence of a business-type record in the Government files that appellant or his corporation would have made up, if *such a record had ever existed.* Here, the privilege is asserted not on behalf of the Government itself, but for the benefit of appellant's competitors in safeguarding the privacy of their business records and information. [Code of Fed. Reg., Title 19, Ch. 1, Sec. 26.4 (Revised, 1953).] It is akin to the secrecy attached to the income tax returns filed by individuals with the Federal Government. Surely it cannot be contended that *Jencks* will open the income tax returns to every marauding defendant who asserts information therein contained might be helpful to him. Neither should appellant be entitled to make a general inspection of these customs records, thereby obtaining information about the operations of his competition.

The ruling of the Court called for an exercise of discretion. The Court said it would allow inspection of specific documents. This was not unreasonable under the circumstances. Appellant did not elect to follow the course indicated, and should not now be allowed to complain.

Appellant claims the Government had the choice of dismissal or disclosure. We cannot move the clock backwards and no such alternative was presented at the trial. If the Government's position as herein expressed is not accepted, then the most to which appellant should be entitled is a new trial, in which the alternative could be presented and dealt with. It should not be the basis for the dismissal of a defendant who has been found guilty by jury trial.

I. Denial to Take Depositions Was Not Error.

Appellant moved during trial to take depositions of certain witnesses in the Republic of Mexico, J.J. Arriaga, Gabino Mancilla Veliz, and Luis Orozco. The latter eventually appeared and testified on behalf of appellant at the trial. Appellant urges error in refusing the request.

Appellant did not see fit to have his proposed interrogatories made a part of the record on appeal. Notice of the Motion was not given as provided by law.

Rule 15, Federal Rules of Criminal Procedure.

Title 18, Section 3492, United States Code:

> ". . . but under Rule 15, the criterion by which the trial court orders the taking of a deposition is whether it is necessary in order to prevent a failure of justice. This discretion vested in the trial court is broad, and Rule 15 contemplates the taking of

depositions in criminal cases only in exceptional instances. . . ."

Heflin v. United States (5 Cir., 1955), 223 F. 2d 371, 375.

The Court determined that appellant made no showing of surprise or other reason for taking the deposition without proper notice. This he would be required to do in order to have the time requirement waived or time shortened.

Rule 15(b), Fed. Rules of Criminal Procedure provides:

"The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time."

Title 18, U. S. C., Sec. 3492 (5 days' notice required).

In any event there is nothing before this Honorable Court on appeal which would indicate that the trial court's denial of the Motion to take depositions resulted in any prejudice to appellant. In order to predicate error on such denial, prejudice must be shown.

Federal Rules of Criminal Procedure, Rule 52(a), (b);

Lutwak v. United States, 344 U. S. 604, 619-620, 73 S. Ct. 481, 97 L. Ed. 593, reh. den. 345 U. S. 919, 73 S. Ct. 726, 97 L. Ed. 1352;

Allred v. United States (9 Cir., 1944), 146 F. 2d 193;

Shelton v. United States (5 Cir., 1953), 205 F. 2d 806, 810, cert. den. 346 U. S. 892, 74 S. Ct. 230, 98 L. Ed. 395.

J. No Error in Instruction Re Lack of Extradition Treaty With Mexico for Perjury.

In his Point VIII (App. Br. p. 15), appellant gives passing reference to the Court's instruction regarding lack of a treaty between the United States and Mexico permitting extradition from Mexico for a person charged with perjury in the United States [Clk. Tr. p. 77-A 19]. Appellant seems to complain that the jury could infer that the testimony of their Mexican witness was untrue from this instruction. In the first place, the Government relied heavily on the testimony of the Mexican official, Jiminez; the defense had Orozco, an employee of the Mexican corporation with which appellant's brother had been employed as an official. Certainly no prejudice is shown by such an instruction, it not being directed in favor of or against either party.

Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314;

United States v. Spadafora (7 Cir., 1950), 181 F. 2d 957, 959.

It operated equally as to both litigants.

K. This Court Should Not Acquit.

Apparently as a makeweight appellant cites the *Yates* case, United States Supreme Court, June 17, 1957, ... U. S. ....., for the proposition that this Honorable Court should direct the District Court to grant a Judgment of Acquittal. In that case the United States Supreme Court found the evidence against certain defendants to be palpably insufficient upon which to base a conviction, and took the extraordinary course of ordering acquittal as to such defendants. However such action may be regarded, there is no such situation presented in the in-

stant case. The evidence before the Court has heretofore been set out, is overwhelming, and need not be repeated at this point. No specification as to the deficiency of evidence is pointed out by appellant.

L. Refusal of Documents Where No Foundation Laid Not Error.

Appellant's Point IX complains that certain documents, which he fails to identify, should have been admitted into evidence. While it would not seem to be the duty of the Government to search the records, and certainly not the Court's duty, to see what documents are referred to, we have nevertheless done so. The Government will not be in a position to reply in writing to the appellant's closing brief, and he may identify such documents therein. It would appear from our examination that appellant refers to Exhibits EB and FB.

The bald assertion is made by appellant that they are documents "authenticated" in Mexico and "certified" by the American Consul. No such evidence was offered to the Trial Court. The attempt to introduce EB and FB was made while the witness Orozco was on the stand [5/3/56, p. 40]. The gist of his testimony was that these purported to be copies of documents dated respectively April 6, 1954 and July 23, 1954. Orozco said he had found them in the files of Almacenes Distribuidores, a Mexican Corporation, during the preceding week. No foundation as to their authenticity or their connection with the appellant or his corporation, or that they concerned lima bean transactions, was shown. The Government objected to the offer on the grounds that there was "no proper foundation" [5/3/56, p. 42], and the objection was sustained. The foundation was never offered.

Manifestly there was no basis for the introduction of such documents and the ruling of the Trial Court was correct. (*Hass v. United States* (8 Cir. 1937), 93 F. 2d 427, 436.) Appellant does not give any reason why this denial by the Court was error. He merely asserts that it was.

M. Denial of Motions for Acquittal Was Not Error.

Appellant assigns the denial of Motions for Judgment of Acquittal as the basis for error. Therein he asserts the "total lack of evidence". This cannot be considered a serious contention, being contained in three sentences without any showing of deficiency in the evidence. There is no attempt in appellant's Brief to state what evidence was before the Trial Court. Ignoring the evidence does not do away with it. The appellee respectfully refers the Court to the Statement of Facts in this Brief as the basis for the Trial Court's proper denial of the said Motions. Nothing would be served by repeating the facts at this point.

N. The Inadvertent Delivery of Defense Offered Exhibits, Not Admitted, to the Jury Room Was Harmless Error.

In Points IX and XI of appellant's Brief, (pp. 16-17), the question is raised that Exhibits J, K, and L for identification were taken to the Jury Room during the Jury's deliberation. (Appellant does not identify the Exhibits, but a study of the record indicates that the foregoing were the ones referred to.) These were not admitted into evidence. They were offered in evidence by the appellant, however [K 4/23/56, pp. 6-7; 4/25/56, p. 65]. The Government objected thereto on the ground that they were not relevant or material and the objection was sustained.

An examination of the Exhibits will show that they consist of a series of invoices of Casaus Inc. bound together by months. They do not pertain to lima beans, hence, were not relevant. The lima bean invoices were separated from these and other such exhibits and introduced individually. J, K and L are invoices of Casaus Inc. They could in no way prejudice appellant, otherwise he certainly would not have offered them in evidence. The error, if any, was harmless and no showing of prejudice has been made by appellant.

A motion for new trial based on the fact that documents improperly went to the jury room during the course of its deliberation raises a question within the sound discretion of the trial court. If the court determines that the matter was not prejudicial and therefore denies the motion, it should only be reversed on appeal if the court can be shown to have abused its discretion.

United States v. Strassman (2 Cir. 1957), 241 F. 2d 784;

Finnegan v. United States (8 Cir. 1953), 204 F. 2d 105, cert. den. 346 U. S. 821, reh. den. 346 U. S. 880;

Leland v. United States (4 Cir. 1946), 155 F. 2d 438;

Quercia v. United States (1 Cir. 1934), 70 F. 2d 997.

The Trial Court therefore properly denied the Motion for a new trial on the ground no prejudice was shown.

IV.
CONCLUSION.

1. There was substantial evidence that appellant perpetrated a wilful and deliberate fraud on the Commodity Credit Corporation.

2. Appellant made the false statement that he had exported all of the C.C.C. lima beans for the purpose of influencing the action of the C.C.C.

3. Appellant exported a substantially lesser quantity of lima beans, to-wit: at least 631,500 pounds less than he was required to export by virtue of his contracts with the C.C.C.

4. The false statement to the designated investigator of the C.C.C. was a crime within the provisions of §714(m), Title 15, United States Code.

5. The indictment sufficiently advised the appellant of the crime with which he was charged to enable him to prepare his defense and avoid surprise.

6. The Trial Court's rulings with respect to appellant's demand for bill of particulars, for inspection of records, and for taking of depositions, were within the sound discretion of that court. No abuse of discretion has been shown. There was no error here.

7. The Trial Court did not err in its instruction as to lack of an extradition treaty with Mexico, nor in denying the offer of documentary exhibits where the necessary foundation was not offered.

8. The Trial Court properly denied the appellant's motions for judgment of acquittal.

9. There was harmless error in delivering appellant's Exhibits J, K and L to the jury room, since these exhibits

were not admitted in evidence. The error was not prejudicial to appellant, who had offered such documents in evidence during the course of trial.

Wherefore, the United States respectfully requests the court to affirm the judgment of conviction.

Respectfully submitted,

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